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# **The Change of Position Defence in Comparative Perspective**

by

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\* \* \* \* \*

ЖЕОРЖ3 АИМИТЕ

# D E D I C A T O R Y / D E D I C A T Ó R I A

In Memory of / À memória dos  
Luyindululu lua



Avós (Granis) y outros Queridos .

Paolla Mateus, Pedro M. Teta, Emilia + ye + Marques Sungo Muleto e Armando Menka Felix

EM RECORDAÇÃO DE

## A I M I T E J O R G E

(B.Phil (St-Paul); BA (UCT), LLB (Rhodes), LLM (Stell)).

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Universiteit van Kaapstad / Universidade da Cidade do Cabo

## D E C L A R A T I O N

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Date: 15 August 2009.

*University of Cape Town*

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## ABSTRACT

This work examines the change-of-position (loss of enrichment) defence comparatively in five jurisdictions, namely South Africa, Brazil, England Canada and USA. It advances a three-part argument which contends, first, that when a legal system opts for a general enrichment principle, it must equally limit it with defences. Secondly, that once the limiting mechanisms are chosen, the system must demarcate their contours and establish the inevitable exceptions. Thirdly, that legal system, as a consequence, must also decide whether to require a symmetric ‘gain-loss’ situation, i.e., whether to insist that the measure of recovery be limited by the plaintiff’s loss. If it chooses a symmetry ‘gain-loss’, that system might face difficulties avoiding a passing on defence, as the reverse face of change-of-position on the plaintiff’s side, thereby potentially undermining indirectly the principle of legality. If it departs from that symmetry, the passing on defence may ‘normatively’ be ignored, unless for policy reasons it opts to have it.

The study concludes that South Africa is bound to adopt explicitly a general principle of unjustified enrichment with change of position as the general defence applicable to all unjustified enrichment claims, save to claims arising from failed bilateral agreements. The study recommends that South Africa may give limited recognition to the passing on defence in its private law of unjustified enrichment where policy considerations do not militate against its application.

## R E S U M O.

Esta obra aborda comparativamente a defesa da perda do enriquecimento (mudança de circunstâncias) no direito do enriquecimento injustificado em cinco países. Se argumenta de forma tripartida que: primeiro, quando um ordenamento jurídico optar pelo princípio geral contra o enriquecimento injustificado, deve também limitá-lo com defesas. Em segundo lugar, uma vez que os meios de limitação forem escolhidos, tal ordenamento deve igualmente estabelecer os parâmetros de tais limitações e indicar as inevitáveis exceções. Em terceiro lugar, como consequência de tais escolhas, deve-se também decidir se no instituto do enriquecimento injustificado há uma necessidade da simetria 'ganho-perda', isto, se é mesmo indispensável que a medida do enriquecimento seja sempre igual ao (ou limitada pelo) valor que o queixoso perdeu. Se a simetria 'ganho-perda' for escolhida como condição necessária, a consequência será que o ordenamento jurídico enfrentará impasse em evitar a defesa de '*passing on*' ["transferência do encargo"], como a outra face da medalha da defesa da perda do enriquecimento do lado do queixoso (or seja, não pode pedir que lhe seja restituído o que você não perdeu por ter 'transferido o encargo' a outros, por exemplo os consumidores), e como efeito collateral o princípio de legalidade será indiretamente violado. Se, ao contrário, se dispensar a simetria 'ganho-perda', a defesa de '*passing on*' pode ser normativamente ignorada, a não ser que se decida tê-la por razão de política legal interna.

O estudo conclui que o direito sul-africano inspirando-se nos direitos dos países que serviram de comparação está destinado a optar explicitamente pelo princípio geral contra o enriquecimento injustificado e que a defesa da mudança de circunstância deverá ser sua defesa geral para limitar tal instituto, excepto em acções que são consequências de contratos bilaterais falidos. O estudo recomenda que o direito sul africano pode aceitar no seu ordenamento jurídico de forma limitada a defesa de '*passing on*' desde que não haja razões de política interna que impeçam sua aplicação.

## ACRONYMS AND GLOSSARY.

### COURT ABBREVIATIONS.

#### Courts and Institutions.

<b>ABA</b>	American Bar Association (USA).
<b>ALI</b>	American Law Institute (USA).
<b>Ariz. App</b>	Arizona Court of Appeals (USA).
<b>B.C.C.A.</b>	British Columbia Court of Appeals (Canada).
<b>BGH</b>	Bundesgerichtshof (German Supreme Court).
<b>BGHZ</b>	Entscheidungen des Bundesgerichtshof in Zivilsachen (Decisions of the German Federal Court in Civil Matters).
<b>CA</b>	Court of Appeals (England).
<b>Cal. App.</b>	California Court of Appeals (USA).
<b>CC</b>	Constitutional Court (South Africa).
<b>Cir.</b>	Circuit Court (USA).
<b>Cours de Cassation</b>	(French Supreme Court) France.
<b>CPD</b>	Cape Provincial Division (South Africa).
<b>CS</b>	Court of Sessions (Scotland).
<b>E (ECD)</b>	Eastern Cape Provincial Division (South Africa).
<b>ECJ</b>	European Court of Justice (European Union).
<b>EWHC</b>	England and Wales High Court (UK).
<b>EWCA Civ.</b>	England and Wales Court of Appeals – <i>Civil Division</i> (UK).
<b>HCA</b>	High Court of Australia.
<b>HL (UKHL)</b>	House of Lords (United Kingdom of Great Britain). This Court is now abbreviated as UKHL.
<b>Hoge Raad</b>	Hoge Raad der Nederlanden (The Netherlands Supreme Court).
<b>KB</b>	King's Bench Division (England).
<b>Law Comm.</b>	Law Commissions (In various countries).
<b>N (NPD)</b>	Natal Provincial Division (South Africa).
<b>NY Supp</b>	New York Supreme Court (USA).

<b>NYCA</b>	New York Court of Appeals (USA).
<b>O (OPD)</b>	[Orange] –Free State Provincial Division (South Africa).
<b>Ont. CA.</b>	Ontario Court of Appeals (Canada).
<b>QB</b>	Queen’s Bench Division (England).
<b>PC</b>	Privy Council (“ <i>House of Lords division for the Dominions</i> ”).
<b>SC</b>	Supreme Court – (USA).
<b>SCA</b>	Supreme Court of Appeals (South Africa). Previously known as Appellate Division (AD) or (A).
<b>SCC</b>	Supreme Court of Canada.
<b>STF</b>	Supremo Tribunal Federal (Brazil).
<b>STJ</b>	Supremo Tribunal de Justiça (Brazil).
<b>T (TPD)</b>	Transvaal Provincial Division (South Africa).
<b>TJRJ</b>	Tribunal de Justiça do Rio de Janeiro (Brazil).
<b>TPD</b>	Transvaal Provincial Division (South Africa).
<b>W (WLD)</b>	Witwatersrand Provincial Division (South Africa).
<b>Wn. APP.</b>	Washington State Court of Appeals (USA).

## LEGISLATIONS AND CODES.

<b>BGB</b>	Bürgerliches Gesetzbuch (German Civil Code).
<b>CC</b>	Código Civil (Brazil).
<b>CCQ</b>	Code Civil de Québec.
<b>CDC</b>	Código do Consumidor [Consumer Code – Brazil].
<b>CPC</b>	Código de Processo Civil (Brazil).
<b>BW</b>	(Nieuw) Burgerlijk Wetboek (New Dutch Civil Code).
<b>UCC</b>	Uniform Commercial Code (USA).
<b>§ U.S.C. (USA)</b>	United States Code (generally statutes).

## SPECIAL GLOSSARY

<b>Acórdão</b>	(Court judgment in Portuguese).
<b>Arrêt</b>	(Court judgment in French).

## **OTHER ACRONYMS.**

<b>RT</b>	Revista dos Tribunais (Brazil).
<b>UFPR</b>	Universidade Federal do Paraná (Brazil).

## **LAW REPORTS, LAW JOURNALS AND OTHER PERIODICALS.**

<b>AC</b>	Appeal Courts Decisions (England).
<b>ALJR</b>	Australian Law Journal Reports.
<b>All EL</b>	All England Law Reports.
<b>All SA</b>	All South African Law Reports (South Africa).
<b>ALR</b>	Australian Law Reports (Australia).
<b>ALR - Fed</b>	American law Report - Federal
<b>CLR</b>	Commonwealth Law Reports.
<b>CMLR</b>	Common Market Law Report (European Union).
<b>DLR</b>	Dominion Law Reports (Commonwealth).
<b>ECR</b>	European Court Report (European Union).
<b>E.H.R.R.</b>	European Human Rights Report [Law Report] (EU).
<b>ER</b>	England Reports.
<b>F.</b>	Federal Reporter.
<b>L.Ed</b>	Lawyers' Edition [Law Report] (USA).
<b>Lloyd's Rep.</b>	Lloyd's Reports (United Kingdom).
<b>L.T.</b>	London Times (Reports).
<b>NE</b>	North Eastern Law Reports (USA).
<b>NJW</b>	Neue Juristische Wochenschrift (Germany).
<b>NW</b>	North Western Law Reports (USA).
<b>NZLR</b>	New Zealand Law Reports.
<b>RT</b>	Revista dos Tribunais (Brazil).
<b>NYS.</b>	New York Supreme Court Reports .



<b>SA</b>	South African Law Reports.
<b>SCR</b>	Supreme Court Reports (Canada).
<b>SLT</b>	Scottish Law Times (Scotland).
<b>SW</b>	South Western Law Reports (USA).
<b>WLR</b>	Weekly Law Reports (United Kingdom).

## **ENCYCLOPAEDIA.**

<i>Amer. Jurisp.</i>	American Jurisprudence (Legal Encyclopedia).
<i>Corp. Juris Sec.</i>	Corpus Juris Secundum (Legal Encyclopedia (USA)).
<b>D.</b>	<i>Corpus Juris Civilis</i> (Justinian Digest).
<b>LAWSA</b>	Law of South Africa.

## **PERIODICALS.**

<b>Acta Juridica</b>	Acta Juridica (Cape Town – South Africa).
<b>Alberta LR</b>	Alberta Law Review (Canada).
<b>Am J Com L</b>	American journal of Comparative Law (USA).
<b>Boston Univ.LR</b>	Boston University Law Review (USA).
<b>Cal. LR</b>	California Law Review (USA).
<b>Can. Bar. Rev.</b>	Canadian Bar Review (Canada).
<b>Ch.</b>	Chancery Court (UK).
<b>CLJ</b>	Cambridge Law Journal.
<b>CLP</b>	Current Legal Problems (UK).
<b>Columbia LR</b>	Columbia Law Review (USA).
<b>Cornell LR</b>	Cornell Law Review (USA).
<b>ELR</b>	European Law Review (European Union).
<b>Fordham LR</b>	Fordham Law Review (USA).
<b>Harvard LR</b>	Harvard Law Review (USA).
<b>Hastings LJ</b>	Hastings Law Journal (USA).

<b>JCL</b>	Journal of Contract Law (Commonwealth).
<b>JLS</b>	Journal of Legal Studies.
<b>JR</b>	Juridical Review (Scotland).
<b>McGill LJ</b>	McGill Law Journal (Canada).
<b>LMCLQ</b>	Lloyd's Maritime Commercial Law Quarterly (UK).
<b>LQR</b>	Law Quarterly Review (United Kingdom).
<b>KCLJ</b>	King's College Law Journal (UK).
<b>Maryland LR</b>	Maryland law Review (USA).
<b>Mich. LR</b>	Michigan Law Review (USA).
<b>MLR</b>	The Modern Law Review (United Kingdom).
<b>NILR</b>	Netherlands International Law Review.
<b>NWU LRev</b>	Northwestern University Law Review (USA).
<b>Oxford JLS</b>	Oxford Journal of Legal Studies (UK).
<b>Revista Forense</b>	Revista Forense (Brazil).
<b>RLJ</b>	(Revista de Legislação e Jurisprudência (Portugal).
<b>RLR</b>	Restitution Law Review.
<b>SALJ</b>	South African Law Journal.
<b>Sydney LR</b>	Sydney Law Review (Australia).
<b>Texas LR</b>	Texas Law Review (USA).
<b>THRHR</b>	Tydskrif vir Hedendaagse Romeins-Hollandse Reg (South Africa).
<b>TIL</b>	Theoretical Inquiries in Law (Israel).
<b>TSAR</b>	Tydskrif vir die Suid-Afrikaanse Reg. (South Africa).
<b>Tulane LR</b>	Tulane Law Review (USA).
<b>U Chicago LR</b>	University Chicago LR(USA).
<b>U.Pa. LR</b>	University of Pennsylvania Law Review (USA).
<b>Univ. Miami LR</b>	University of Miami Law Review (USA).
<b>Univ. Toronto JL</b>	University of Toronto Law Journal (Canada).
<b>Virginia LR</b>	Virginia Law Review (USA).
<b>Wis. LR</b>	Wisconsin Law Review (USA).
<b>Yale LJ</b>	Yale Law Journal (USA).

## Citation Method used in the Thesis.

The following approach is used in citation throughout this thesis:

**1 – Journals:** The title of the article is not cited in the footnotes. Full citation appears in the Bibliography at the end of the thesis. In the footnotes only the author's name, the year of publication, the volume and the page in which the article appears are cited.

**2 – Books:** The author's name, the title of the book in italic, edition if any, publication year and the page are cited. The Publisher and local of publication appear in the Bibliography.

**3 – Chapters in Books:** The author of the chapter (article), the title of the chapter (or article) in single inverted comas, followed by the book editor(s), the title of the book, year of publication, and the page in which the chapter appears are cited. Full citation is provided in the Bibliography.

**4 – Encyclopaedia:** The title of the Encyclopaedia, volume, year of publication (if available) and paragraph (par. or §) in which the text appear are cited. If the Encyclopaedia has an editor or reviser, the reviser's name, it is also cited.

**5 – Online material:** The materials are cited as they appear online, and the URL given, and the last time the article was retrieved is also given.

**6 – Codes:** Are cited as they are cited in their respective jurisdiction.

**7 – Cases:** Court Judgments (known in Portuguese as “**acordões**”, or “**arrêt**” in French) are cited as in their respective jurisdiction.

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\* \* \*

## INTRODUCTION

*'Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiores.'*<sup>\*</sup>

### ***A. General Considerations.***

This thesis examines the change-of-position (loss of enrichment) defence comparatively in five jurisdictions, namely: England, Canada, United States of America, Brazil and South Africa. It puts forward a three-part argument which contends, first, that when a legal system opts for a general enrichment principle, it will be forced to curb that wide principle with general defences to avoid the potential pitfalls of a principle intrinsically intertwined with equitable traits. Secondly, that once the limiting mechanisms are chosen, the system will be forced to explore the contours of the limiting techniques and establish the inevitable exceptions. Thirdly, that legal system, as a consequence, will also be forced to decide whether to require in all and any enrichment claims a symmetric 'gain-loss' situation, i.e. whether to insist that the measure of recovery be limited by the plaintiff's loss and thereby recognizing a loss of enrichment or a 'change-of-position' defence.

If it chooses a symmetry 'gain-loss', the sequel might be that that system will find it difficult to avoid a passing on defence, as the reverse face of change of position on the plaintiff's side, thereby potentially undermining the principle of legality indirectly. If it departs from the symmetry 'gain-loss', then the passing-on defence may normatively be ignored altogether, unless for policy reasons it opts to have it.

What, then, is a change-of-position defence? As it will be shown in detail throughout the thesis, change-of-position or loss of enrichment<sup>1</sup> is a 'positive defence'<sup>2</sup> in terms of

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<sup>\*</sup> D. 50. 17. 206.

<sup>1</sup> 'Change of position' and 'loss of enrichment' will interchangeably be used, though the concepts have subtle differences, which are explained in chapter one. The same applies to 'unjust' and 'unjustified enrichment' whose differences are also explained in chapter one. It is not the objective of this thesis to concentrate on those differences, though in some specific instances they may be relevant to the theme of the thesis. When that occurs, the subtle differences will be highlighted in loco.

<sup>2</sup> Throughout the thesis I will prefer the labels 'positive defence' / 'negative defence' to that used in American jurisprudence 'affirmative defence' to describe the same phenomenon, though the conceptions will not substantially differ. The choice is simply to avoid a possible cliché with the notion of 'affirmative action' in public law, even if it might appear distant from the field under discussion.

which the defendant ‘acknowledges’ the validity of the plaintiff’s claim, but he nevertheless pleads to be exonerated from the liability to restore in full or in part the said enrichment due to changed circumstances that would render it ‘inequitable’ for him to account to the plaintiff. However, as will be demonstrated, the defence is not uniformly understood in all legal systems.

It is hardly contestable today that common law and civil-law jurisdictions ultimately trace their law of unjust or unjustified enrichment to the same idea, albeit that the vicissitudes of history have caused each to develop along differing lines. This common origin is reflected in the objection that most legal systems show to those who would benefit at others’ expense without justifiable reasons.<sup>3</sup> However, when it comes to the defences available to those who might have reasons not to restore all or part of a ‘benefit’ that has fallen into their hands because some subsequent event might have happened, there is less common ground.<sup>4</sup> It appears that these differences are, inter alia, related to the way the whole law of unjustified enrichment is conceived<sup>5</sup> in these jurisdictions, the process through which it developed and other externalities.<sup>6</sup> The differences include the definition of what should be returned, that is to say, whether it is the object itself or its value; and if it is the value, when that value is to be assessed; and if the object no longer exists, what should be done and how it is to be done.

These differences in how unjustified enrichment is understood obviously have a bearing on the defences that are available to resist an unjust/unjustified enrichment claim,

<sup>3</sup> See Section 1, of the American *Restatement of the Law of Restitution: Quasi-contracts and Constructive Trusts* (1937) (hereinafter to be cited as ‘*Restatement of Restitution*’ (1937)): ‘A person who has been unjustly enrichment at the expense of another is required to make restitution to the other’; Art 884 of the Brazilian Civil Code 2002 (infra note 606 [item 4.2.2.3(A) and 4.2.2.3(B)]) and contrast this to its 1916 Civil Code, art. 964.

<sup>4</sup> Compare Art. 885 Brazil Civil Code 2002, and Section 142 of the American *Restatement of Restitution* (1937).

<sup>5</sup> See e.g. A. Burrows (1983) 99 *LQR* 217; *Woolwich v IRC* (1992) 3 All ER 737 at 752g and 759h (per Lord Goff). In this case, Lord Goff refers constantly to the ‘structure’ of the law of restitution, thereby implying that the subject has a distinct existence and its own framework. See also P. Watt (1991) *LRQ* 521. For Canada, see A. Drassinower (1998) *Univ. Toronto LJ* 459-488; L.D. Smith ‘Property, Subsidiarity and Unjust Enrichment’ (2000) *Oxford University Comparative Law Forum* 6 at [www.ouclf.iuscomp.org/](http://www.ouclf.iuscomp.org/); For South Africa see D. P. Visser 1992 *Acta Juridica* 203, 209-210.

<sup>6</sup> See P. B. H. Birks, ‘*The Foundations of Unjust Enrichment: Six Centennial Lectures*’ (2002) p. 2 why the Reporters of the 1937 *Restatement of Restitution* changed the name of the document at the last moment.

especially those termed as ‘positive’ (affirmative) defences.<sup>7</sup> For instance, if the law of unjustified enrichment is seen as a gap-filling or a residual subject, as some legal systems do,<sup>8</sup> it may not recognise certain remedies or provide protection in some cases meriting it. Furthermore, if the subject matter does not have ‘its own structure’ and its own framework<sup>9</sup> which is different from the other areas of obligations, the effect that that view will have on the defences will differ greatly from a system that recognises its autonomous existence.

Thus far South Africa neither explicitly recognises a general enrichment claim,<sup>10</sup> nor does it delineate the scope of its loss of enrichment defence, and its jurisprudence is almost entirely silent on where it stands as to the availability or otherwise of a passing-on defence in enrichment claims. In the writer’s view, if these gaps in the structure of South African law are filled in, the effect might be the emergence of a more dynamic enrichment law that would put South Africa on a par with other developed legal systems, revolutionizing the field as an independent branch of the law of obligations and giving the courts a wider basis to develop the common-law.

<sup>7</sup> A. Kull (1995) 83 *California LR* 1191, 1232. They are so called ‘affirmative defences’ because in their operation they invite a balance of equities between the parties, in that the defendant concedes (or ‘affirms’) that he received a benefit of a kind for which the plaintiff might ordinarily recover in unjust enrichment; nevertheless he pleads that the circumstances make it inequitable to hold him liable.

<sup>8</sup> *Restatement of Restitution* (1937) § 142; For South Africa see again D. P. Visser 1992 *Acta Juridica* 175. For Canada see *Rural Municipality of Storthoaks v Mobil Oil Canada Ltd* (1976) 2 SCR 147; For England *Lipkin Gorman v Karpnale* (1991) 2 AC 548 (HL). The Brazilian CC of 2002 in art. 238 also sanctions ‘loss of enrichment’ as a defence where the defendant is unable to perform due to an impossibility ‘mostly’ arising from a ‘*casus fortuitus*’. But see chapter 4 below on the limitations of this approach where I discuss its shortcomings on the understanding of § 818(III) BGB.

<sup>9</sup> This situation is being slowly changed, and more and more countries in both common law systems and civil-law system are now converging again. ‘Without juristic reason’ is still where the main differences remain. The Canadian, as we shall see later have advanced to ‘without juristic reason’; England, Australia and New Zealand and most States in the USA retain the ‘unjust factor’ approach, although the interpretation given to the ‘unjust factors’ may vary from jurisdiction to jurisdiction (exception in USA include Louisiana, North Dakota, Arizona and Delaware, states that embrace the ‘absence of basis’ approach). In England the situation is currently somewhat ambivalent as the ‘without legal basis’ approach seems to be coexisting with the ‘unjust factor’ approach. (See P. B. H. Birks, *Unjust Enrichment* (2005) 116-117; T. A. Baloch (2007) 123 *LQR* 636).

<sup>10</sup> On the need of such general enrichment action, see among others P. O’Brien (2000) *TSAR* 752-760 and other sources cited there; D. P. Visser *Unjustified Enrichment* (2008) discusses the issue extensively in the various chapters of the book and what manifestation the principle may have in the law.

## ***B. Structure and Organization of the Thesis.***

This thesis examines the change-of-position defence in the various jurisdictions under consideration on the basis of the following structure:

Chapter one presents in detail what the defence is and examines its historical development in both common-law and civil-law systems. It also offers a brief historical overview of the development of the enrichment doctrine in both legal families, as well as a brief contrast of the ‘unjust factor’ approach (and describes its current situation) against the ‘negative approach’ (the *sine causa* approach) of the civil-law systems.

Chapter two explores the relationship of change of position with other enrichment defences, and seeks to establish the scope and ambit of change of position within all enrichment defences, before the thesis proceeds to analyse the availability of the defence, or otherwise, where public bodies are concerned.

Chapter three explores the difficulties of enrichment liability arising from ineffective bilateral agreements. It analyses the synallagmatic return of benefits received and the allocation of risk in instances where performance has become impossible. Where performance became impossible, and no risk allocation was agreed between the parties, the thesis contends that the risk of loss should be allocated to the party who has/had control at the time of the loss and could reasonably have insured against the loss. The thesis, however, also contends that before the courts allocate the risk to such a party, due consideration must be given to the nature of the risk, whether it was endogenous or exogenous, as well as to clearly establishing the superior risk bearer. This chapter concludes that, in bilateral agreements, the defence of change of position (loss of enrichment) is not to be made available to the plaintiff, thereby establishing an important exception to the general defence that is noted throughout the thesis.

Although change-of-position is conceived as a general limiting mechanism to the action, it is not the only limiting defence and, if a jurisdiction does not directly recognise change-of-position, it will still limit the general enrichment action in other ways. Therefore chapter four looks at a specific jurisdiction (Brazil) that has recognised a general



enrichment action without recognizing a general defence of change of position explicitly. The examination proceeds by first making a structural analysis of this jurisdiction's enrichment law as a whole, its nomenclature and underlying issues and conceptions; secondly, it explores certain other defences, and draws a tentative inference as to a possible subtle change-of-position application. The chapter ends by exploring the implications of attaching the expression 'updating monetary value' to the general enrichment action and how to measure the sum of interest payable (if claimable) in an enrichment claim where the principal sum has been adjusted.

Chapter five replicates the structure followed in chapters two and three above and essentially analyses the application of enrichment principles in the public-law sphere, with particular emphasis on the situation where taxes have been collected by public authorities, which are subsequently declared as 'inappropriately charged'. Its main focus is the defence of passing on, the merits and demerits of such defence, and the contention that it is a specific manifestation of the defence of change of position. The underlying principles of this defence and, obviously, its relationship to change-of-position and the desirability or otherwise of their coexistence in the enrichment law are explored. It is contended that passing on should not be accepted, not because it is in principle undesirable, but rather on account of the near impossibility of establishing the necessary proof that its requirements have been satisfied, although the thesis concludes that such complexities may be overstated. It therefore argues that the rejection of the defence should be qualified and due consideration given to the availability of the defence if the imposts at issue were not meant to be passed on, but were nevertheless passed on in circumstances where the claimant used 'mark-up pricing' in the operation of its business.

Chapter six concludes the thesis. By virtue of the thesis using a 'built-in' recommendation approach which appears at the end of each chapter, each chapter's conclusion, therefore, presents the main finding in respect of that particular aspect of the doctrine of change of position. Consequently, chapter six, as a general conclusion, is essentially, the summation of these findings and recommendations plus any other

pertinent issues<sup>11</sup> and suggestions that may not have been extensively summed up in the main body, and which were deemed necessary or useful to highlight at this stage.

### ***C. Methodology.***

As a comparative study, the dissertation focuses on the landmark decisions and enactments on the issues in each jurisdiction, whenever they are available. In the case of Brazil, where neither court decisions nor legislation relating to this topic expressly exists, the focus is on the academic approach to the issue (*'a doutrina'* for Brazilians). Thus, for Brazilian law, the spotlight is on its new Civil Code provisions on *'enriquecimento sem causa'* or related provisions. For England, Canada, United States, and South Africa the decisions of the highest courts, coupled with Law Commission's Reports or Restatements of the Law, where available, and the common-law answers are scrutinised. The thesis therefore applies a combination of deductive and inductive research methodology in assessing each substantive aspect, depending on the aspect being analysed and/or the jurisdiction under consideration.

A recurring problem in the development of the thesis was the question whether an institution or a particular aspect of the law in one legal system had an equivalent in the other legal systems under analysis, which could enable a proper comparison. If it did not have any, one had to find ways to discover how such a system deals with similar factual scenarios. In other words, the issue that the thesis confronted from the outset was the comparability of the laws themselves. As legal systems rest on different philosophical principles and different modes of societal organization, it was important to be alert to the danger of value judgment<sup>12</sup> and the temptation of ascribing one's own perception of reality to a foreign legal system based on a different culture and a different way of life, or perhaps being in a process of transformation. This aspect became extremely relevant when dealing with Brazilian law, as this legal system does not even mention loss of enrichment/change-of-position as a defence. Hence, in order to proceed, the analysis had

<sup>11</sup> Examples that fall within this aspect are 'inflation' and 'revalorization' of a currency.

<sup>12</sup> On dangers of value judgment in comparative law see G. Canivet (2006) 80 *Tulane LR* 1377, 1396-97.

to consider the different philosophical principles and guiding norms and values that inform this legal system. The same was true of the American legal system, the guiding philosophy of which, at least in so far as the unjust enrichment doctrine is concerned, is founded on principles abhorring non-consensual transfers and forced exchanges,<sup>13</sup> or as Henry Matter<sup>14</sup> puts it, on the goal of protecting autonomy (or liberty), the principle of minimal coercion and the ‘non-harm’ rule unless justified by a higher-priority interest.

#### ***D. Nomenclature and Terminology.***

Dealing with five diverse jurisdictions spread over three continents and whose laws have different historical roots, it is, of course, to be expected that there will be, on the one hand, different nomenclature for the same institutes or doctrines and, on the other hand, completely different meanings or with no equivalents. The thesis does not dwell on the terminological differences, although it does mention them briefly when encountered and explains the basic difference *in loco* whenever necessary. Nevertheless, for the purposes of this study as a whole, some terminological differences are ignored and the terms from both civilian and common law jurisdictions are used interchangeably. Thus change of position, disenrichment, change of circumstances, and loss of enrichment mean the same thing in the thesis unless the context shows otherwise; the same applies to unjust enrichment and unjustified enrichment as they refer to the subject as a whole. Other minor differences are explained *in loco* whenever they are used. The thesis uses only ‘he’ and ‘him’ for elegance’s sake instead of the ‘he/she’ and ‘him/her’ binary. The female gender is implied whenever ‘he’ and ‘him’ is used unless the context indicates otherwise.

<sup>13</sup> M. P. Gergen (2005) 13 *RLR* 224, 225. For example, though the principle against forced exchange runs throughout the whole unjust enrichment doctrine, under the proposed § 34 of the new *Restatement (Third) of Restitution and Unjust Enrichment* (Tentative Draft 3, illustration 3, 4, and 5), the principle against forced exchange is ‘violated’. In this section the Drafters of the new *Restatement* concede that the court must be allowed to ‘impose a forced exchange on the defendant in cases where it is required to put a reasonable value on the performance’. Such possibility arises mainly in situations of partial performances of failed agreements in which the performance cannot be returned in *species*, and the defendant must be paid to claim for non-conforming performance, and where the defendant’s obligation cannot be derived from his agreement.

<sup>14</sup> (1982) 92 *Yale LJ* 14, 42.

## CHAPTER I.

### A HISTORICAL SYNOPSIS OF THE CHANGE-OF-POSITION DOCTRINE.

#### 1.0. *Introduction.*

When X (the plaintiff) claims that Y (the defendant) has something which he is not entitled to keep as his, there are instances in which Y, though acknowledging the validity of the claim, i.e, that he has been enriched at the plaintiff's expense and in all probability without 'justification'<sup>15</sup> and that the retention of such enrichment in the circumstance would be inequitable, he may nevertheless still be able to plead that he is no longer enriched. This is the change-of-position defence. Generally, this defence balances the plaintiff's interest in recovering the wealth transferred against the defendant's interest in being able to deal with what he honestly believes to be his. The balancing of the plaintiff's and defendant's interests are a clear manifestation of the equitable principles in which an enrichment claim itself is rooted, and such balancing is only possible because of the underlying idea that, where the equities are held to be equal, the loss should lie where it falls. Obviously, if the equities favour the defendant, he should also be able to prevail because the claim itself asserts that the plaintiff is to recover when it is equitable to do so.

The need of comparison overwhelmingly (though not exclusively) arises in regard to mistaken payments of money, where the likelihood of 'inevitable loss' to any one of the litigants figures prominently. As will be seen later in this chapter, some early interpretations of the defence have indeed held that if the right to recover money paid under mistake, for example, is to be measured by an 'equitable' principle, it is logical that an 'equitable' defence should also adhere to this principle<sup>16</sup> and change-of-position is

<sup>15</sup> This element is one of the aspects that divide common law from civil-law in unjustified enrichment claims. 'Sine causa' is the position in civil-law jurisdictions, while common law jurisdictions adhere to the 'unjust factor' approach. Canadian common law now expresses it as 'absence of juristic reason'. These issues will be alluded to in more detail later in this work.

<sup>16</sup> Vinnius, for example, discussing the question whether the *condictio indebiti* would lie for error of law as well as error of fact, says: 'Movel me premium haec ratio, quod condictio indebiti ex bono et aequo datur, qui omnino consequens est, eam non nisi exceptione aequitatis ex adverso excludi posse' [The first

exactly such defence. However, the notion of an 'equitable' defence has always been a concern since 'equity' has tendency to introduce uncertainty in the law.

Although the defence is rooted in the Roman law itself, many civilian systems based on Roman law do not have such a defence as a limiting device to a claim in unjust (or unjustified) enrichment. France does not expressly have this defence. The same is true of Brazil and Italy. It is, however, available in Germany (BGB § 818(3)) and in the Netherlands.<sup>17</sup> England is a common-law country which has recently fully embraced change-of-position as a general defence to claims in restitution.<sup>18</sup> The recognition of this principle was, as one assumes, inspired by the developments in other jurisdictions such as Canada,<sup>19</sup> New Zealand,<sup>20</sup> some Australian States<sup>21</sup> and South Africa<sup>22</sup>. In some instances the defence has been introduced by statute or by codification while in other occasions, following in the footsteps of the development of the law of unjust or unjustified enrichment itself, it was introduced by court decisions. The method by which the defence entered each legal system also affects its ambit and scope.

It is vital to note that not all jurisdictions that have such defence agree exactly on what is meant by change-of-position. Some speak of it as disenrichment or loss of enrichment,

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consideration which moves me is that the *condictio indebiti* is given on the basis of what is decent and fair, from which the main consequence is that, from the other side, it can only be cut off by a defence based on fairness]. (A. Vinus, *In Quatuor libros Institutionem Imperialium Commentarius* (1642) § 3.27.6; see also P. B. H. Birks 1984 *Current Legal Problems* 1, 21). Obviously, it is not suggested with this that the *condictio indebiti* according to its own wording was an action that rested on *bona fides* or *aequum et bonum*. It surely directed the judge to ask whether there was a plain and strict legal rule. However the explanation of the restitutionary grounds of the *condictio* is that the strict debt was then itself attributable to *aequitas* (fairness, reasonableness).

<sup>17</sup> Article 6:212.2-3 BW. The relevant parts of the art. 6:212:2 read as follows: 'If there is a loss of enrichment as a result of a circumstance for which the party is not to blame, it is disregarded to that extent: 6:212:3 - The duty to compensate for damages may also be limited if the loss of the enrichment can indeed be attributed to the enriched party, but such a loss of enrichment took place in a period in which the enriched party did not reasonably have to bear in mind the duty to compensate' (translations as cited in J. Beatson & E. Schrage, *case. Materials & Texts in the Law of Unjust Enrichment* (2003) 459).

<sup>18</sup> *Lipkin Gorman v Karpnale Ltd* (1991) 2 AC 548.

<sup>19</sup> *Rural Municipality of Storkhoaks v Mobil Oil Canada Ltd* (1975) 55 DLR (3d) 1.

<sup>20</sup> New Zealand Judicature Act 1908, s 94B as amended; *National Bank of New Zealand v Waitaki International Processing Ltd* (1997) 1 NZLR 724.

<sup>21</sup> Australia, like New Zealand, introduced the defence at common law latter in 1992 in *David Securities v Commonwealth Bank of Australia* (1992) 175 CLR 353; (1992) 66 ALJR 768, but some States had that defence in Statutory form long before the High Court decided this case. Western Australia Act 1962, s 65(8) and Property law Act 1969, s. 125.

<sup>22</sup> *African Diamond Exporter (Pty) Ltd Barclays Bank International Ltd* 1978 (3) SA 699 (A).

others as change of circumstances or change of position.<sup>23</sup> Although these notions may ultimately produce to the same result in most cases, they do embody subtle differences that will be discussed shortly. Nonetheless, it appears that the essence of the defence is that it foregrounds the dilution or dissipation of an economic advantage received by the *bona fide* actions of a defendant. Each 'reliant',<sup>24</sup> action which *pro tanto* reduces the economic advantage, or annuls it altogether, gives rise to a change-of-position defence to that extent. That part of the economic advantage received is consequently not returnable.

From the aforesaid it is obvious that at least the defence cuts back the measure of enrichment liability from the enrichment initially received to that which survives in the defendant's hands when the claim is made. However, the conception of the defence differs between those who base it on disenrichment and those who emphasise the change of circumstances in general: when the focus is put on disenrichment, the defence operates solely or primarily by reference to the defendant's loss of enrichment, but when the emphasis is put on change of circumstances in general, the defence operates, not only by neutralizing the injustice of the defendant's retention of that part of the initial receipt which has been lost or dissipated prior to the plaintiff's claim, but also includes what has been given up in return and all encumbrances resting on what has been received.<sup>25</sup> The former view of the defence is clearly narrower than the latter. In essence, the wider view supports the approach that the defendant must never be worse off than he was before he received the enrichment, save in exceptional circumstances.<sup>26</sup> Given that claims in unjustified enrichment arise *ex aequo et bono*, it is understandable that the defendant should ordinarily not be prejudiced by the claim over and above the amount of his surviving enrichment.

Whatever line of reasoning one follows, it is virtually certain that the defence of change of position, when available and quantifiable in 'monetary terms', always requires the

<sup>23</sup> The defence is known as loss of enrichment in South Africa, change of circumstances in USA, change of position in England, Canada and Australia and disenrichment in Germany.

<sup>24</sup> Later in the dissertation the issue of whether the defence is solely concerned with 'reliance' or also includes 'anticipatory' loss will be alluded to.

<sup>25</sup> See M. Chen-Wishart (2000) 20 *Oxford JLS* 563; See also Staudinger/Lorenz § 818 No. 50 (as cited in T. Krebs, in E. J. H. Schrage (Ed.) *Unjust Enrichment* (2001) 311).

<sup>26</sup> M. Jewell (2000) *RLR* 12.

assessment of how much of the initial receipt survived in the defendant's hands, although it also frequently addresses the question of the equities in the case.<sup>27</sup> It is, however, not so certain to what extent the parties' equities per se ultimately determine the availability of the defence. Reading historical material and case law, it is evident that there are considerable variations in the equity standing in favour of each party from jurisdiction to jurisdiction in the determination and the applicability of the defence.

Meanwhile, before considering the history of the defence proper, it is worth first discussing, in a snapshot, the history of unjust or unjustified enrichment itself, because that is the context in which the defence developed.

### 1.1.0. Brief Outline of the Evolution of Unjustified Enrichment Doctrine.

#### 1.1.1. *Evolution of Enrichment Law in the Civilian Systems Based on Roman Law.*

It is common cause that early Roman law knew no general remedy for unjustified enrichment, but offered three specific legal conceptions which can be seen as kindred to, or a specific manifestation of, the general notion of unjust enrichment: (i) – the *condictio*; (ii) the extended action of *negotiorum gestio* (mainly the action *negotiorum gestiorum contraria*); and (iii) the *actio de in rem verso*.<sup>28</sup> One form of the ancient *condictio*, which – by the time of Justinian had become known as the *condictio indebiti* – enabled someone who had had money or delivered goods in error to reclaim the money or the goods. This *condictio* enabled restitution of what had been performed on the basis of a

<sup>27</sup> M. Chen-Wishart (2000) 20 *Oxford JLS* 564-566.

<sup>28</sup> P. Gallo (1992) 40 *American J Comp Law* 431, 438; The Law of South Africa (LAWSA), Vol. 9 2<sup>nd</sup> Edition (2005) (per J. G. Lotz, revised by F. D. J. Brand) §§ 207 - 244; D. H. van Zyl 1992 *Acta Juridica* 115. J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 36. Various circumstances in which the *actio de in rem verso* would normally apply are mainly subsumed in the discussion of the '*condictio sine causa specialis*' in South African law, still adhering to the old *condictiones*; F. Giglio (2003) 23 *Oxford JLS* 455, 458-460.

void contract, as well as where no contract had been concluded between the parties,<sup>29</sup> and where the performance was the consequence of mistake.

*Negotiorum gestio* developed in close relation with agency (*mandatum*) and enabled one who acted in an emergency in the interest of another, without previous authority to be compensated for his altruistic behaviour - but, as such, it was not an enrichment action. Essentially, the *actio negotiorum gestiorum contraria* was only available if the plaintiff had acted with the intention to bind the principal to himself. In some situations, however, the action against the principal (*actio negotiorum gestiorum contraria*) could have the character of an enrichment action (see, for example, D. 3.5.5.5). This manifestation of *negotiorum gestio* is often referred to as the ‘extended’ action. Because this ‘extended’ action dates back to the Roman times, various legal systems inspired by the Roman tradition in their earlier codification opted, for example, to classify the treatment of *negotiorum gestio* alongside the enrichment claims under the general rubric of ‘quasi-contracts’.<sup>30</sup> The common denominator under this scheme of classification is the fact that both kinds of legal concepts give rise to liability (reciprocal rights and obligations in a manner somewhat similar to contractual liability), but without the essential element of a contract, namely *consensus* between the parties, being present.<sup>31</sup> In its ‘extended’ form the *actio negotiorum gestio* in fact fulfilled the function of an enrichment action, although there was a degree of uncertainty and confusion among certain authors<sup>32</sup> as to the true nature of the ‘ordinary’ or ‘normal’ form of action. Some of the authors created the impression that all actions arising from *negotiorum gestio* were enrichment actions, but in fact they were not so considered. The main instances in which the *gestor*’s claim would ordinarily be limited to the extent of the actual enrichment of the *dominus* appear to have

<sup>29</sup> On the meaning of the term ‘condictio’ and a brief history of the expression see *LAWSA* Vol. 9, 2<sup>nd</sup> Edition (2005) (per J. G. Lotz, revised by F. D. J. Brand) § 210; J. Helebeek, *The Concept of Unjustified Enrichment in Late Scholasticism* (1996) chap. 1.

<sup>30</sup> For modern examples see chapter four below dealing with Brazilian law and other Codes cited there.

<sup>31</sup> See D. H. Van Zyl, *Negotiorum Gestio in South African Law* (1985) 65.

<sup>32</sup> For details of these authors see generally among others D. H. Van Zyl, *Negotiorum Gestio in South African Law* (1985) 86, who refers to *Cujacius, Ad Africanum Tractatus* II, Van der Kessel, *Dictata ad Institutiones* 3.28.5.



been the following: (i) where the *gestor* had administered the affairs of a minor;<sup>33</sup> (ii) where he had *mala fides* administered the affairs of another for his own behalf;<sup>34</sup> (iii) where he had administered the affairs of another in the *bona fide* belief that they were his own;<sup>35</sup> and (vi) where he had administered the affairs of another contrary to the express wishes of the *dominus*<sup>36</sup> (*domino prohibendo*), though some of these four aspects have controversial nature.<sup>37</sup> Some modern legal systems may not necessarily refer to these aspects, but they embody subtle ideas reflecting some or all of these manifestations.

Finally, the *actio de in rem verso*, was introduced in order to compel the father (*pater familias*) or the master to give back what he had obtained as a consequence of a contract executed by the son or a slave.<sup>38</sup> This action was developed because the ancient Romans did not recognise direct agency. The *condictiones*, which required a direct conveyance by the claimant to the defendant, and the absence of a *causa* (basis) which could justify the retention of the thing by the defendant, were of no avail to an impoverished person where the transfer of wealth did not take place directly between the parties to the claim, but the defendant had benefited. To address this imbalance, the action *de in rem verso* was introduced and through it the claimant could seize what the defendant had turned to his benefit (*in rem versus*). This action was indeed equitable and to succeed in term of it, it

<sup>33</sup> D. 26.8.1 (per Ulpian).

<sup>34</sup> This aspect is based in D. 3.5.5.5 (per Ulpian).

<sup>35</sup> D. 3.5.48 (per Africanus) read with D. 12.1.23 (also per Africanus). While the first text [D. 3.5. 48] reads: ‘Si rem, quam servus venditus subripiisset a me venditore, emptor vendiderit eaque in rerum natura esse desierit, de pretio negotiorum actio mihi danda sit, ut dari deberet, se negotium quod tuum esse existimares, cum esset meum, gessisses: sicut ex contrario in me tibi daretur, si, cum hereditatem, quae ad me pertinet tuam putares, res tuas proprias legatas solvisses, quandoque de ea solutione liberarer’; the second text (D. 12.1.23) clearly reads as follows: ‘Si eum servum qui tibi legatus sit, quasi mihi legatum possederim et vendiderim, mortuo eo posse te mihi pretium condicere Iulianus ait, quasi ex re tua locupletior factus sim’.

<sup>36</sup> See generally the dissensions surrounding C. 2.18.24 and D. 17.1.40. Among the glossators who refer to this are Accursius, *Corp Iur Civil glossat*, gloss non consentio ad D. 17.1.40; Placentinus, *Summa cod.* 2.19. Contrary views are, amongst others, in Accursius, *Liber Iuris Florentinus* 4.4.11 and V. Scialoja, ‘Della Negotiorum Gestio Prohibente Domino ed in specie dell’a Azione di Regresso del Terzo che Paghi un Debito altrui contro la Volontà del Debitore’ in *Studi Scialoja* 3 (1932) 389-403.

<sup>37</sup> See generally J. E. Scholtens (1951) 68 *SALJ* 134-147; D. H. van Zyl, *Negotiorum Gestio in South African Law* (1985) 65-93; Pothier, *Appendice* 190-193. For a current treatment of *Negotiorum Gestio* in other jurisdictions see Christian von Bar (ed) *Benevolent Intervention in Another’s Affairs* (2006). This last publication deals with the treatment of *negotiorum gestio* in all European Union member States as well as the position the DCFR (Draft Common Frame of Reference) is assuming on the matter. It explains the position of DCFR in relation to the existing laws of the member States.

<sup>38</sup> P. Gallo (1992) 40 *American J Comp. Law* 438; J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 36.

did not matter whether the claimant was impoverished and the defendant enriched, but it looked for an equitable solution, i.e, a solution according to justice, which took the general situation of both parties into consideration.<sup>39</sup> The main features of this new action were: (i) a three-party situation; (ii) the limitation of the extent of liability to the enrichment of the defendant; and (iii) an economic loss by the plaintiff.<sup>40</sup> Hence, the defendant could not be made liable in unjustified enrichment beyond the concrete benefit which he obtained from the transfer of wealth and was still present in his assets. Furthermore, this action was not triggered by the invalidity of the basis of the transfer, as was the case for the *condictio*. In fact, an *actio de in rem verso* might be granted despite the existence of a valid cause.<sup>41</sup>

Although classical Roman law was too rigid and permitted only specific remedies under specific actions, and the sources do not acknowledge a general enrichment action,<sup>42</sup> in the later Roman law, mainly in the Middle Age, the situation tended to be more flexible and progressively a positive attitude developed toward generalization,<sup>43</sup> principally in the context of 'restitution'.<sup>44</sup> The last title of the Digest (*De diversis regulis iuris antiqui*) contains (in D. 50.17.206) a general prohibition of unjust enrichment (albeit without having the status of an enforceable rule of law) and in D. 12.6.14 the principle is identified as being equitable according to nature; in D. 2.15.8.22 it is described as

<sup>39</sup> F. Giglio (2003) 23 *Oxford JLS* 459.

<sup>40</sup> For the *condictiones* and history of this action see generally R. Zimmermann, *The Law of Obligations*, (1990) 834-857.

<sup>41</sup> F. Giglio (2003) 23 *Oxford JLS* 459.

<sup>42</sup> See for example J. E. Du Plessis ((2005) *SALJ* 141, 143-144 and authorities cited there) who synthesises that view when, inter alia, he says: 'Although Roman lawyers at times stated that a condition could be used to reclaim a specific thing or sum of money because it is in the hands of another without a causa, it unfortunately is rather difficult to establish clearly what this was supposed to mean (...) and if one takes into account that Roman law in any event did not recognise unjustified enrichment as a source of obligation, it should be apparent that, from modern perspective, it is difficult to obtain strong guidance from Roman law sources on what the notion of the absence of legal ground is supposed to mean'.

<sup>43</sup> Cf. however the view expressed in LAWSA par. 207 (vol. 9, 2<sup>nd</sup>. Edition) that 'although there are some texts in the *Corpus Juris Civilis* which appear to indicate the contrary', Roman Law did not manifest clearly any such positive attitude towards generalisation, and what in Grotius *Indeilinge* 3.30.18 appears to be a formulation of a general enrichment action with reference to Roman law, is no more than a discussion of the *condictio sine causa specialis*. For a more detailed historical discussion of the issue, in Germany, France, The Netherlands and eventually South Africa see D. H. Van Zyl 1992 *Acta Juridica* 115.

<sup>44</sup> The interaction between the theological schools and the *ius commune* is mostly noticeable in this area. Although in the Roman law the approach to unjust enrichment instances was conceived differently from the theological concept represented by the doctrine of restitution, the underlying idea in both notions is the same: no one is permitted to enrich himself at another's expense without justification.

equitable and D. 14.3.17.4 and 5; D. 23.3.6.2 and D. 23.3.16 reflect the same disposition. In a general way, the civilian system of unjustified enrichment can be said to have emerged from Pomponius' maxim '*Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiores*'.<sup>45</sup> Since the 12<sup>th</sup> century the remedies mentioned above were progressively reinterpreted.

*Negotiorum gestio* was developed to include an *actio* reach the *negotiorum gestorum utilis*,<sup>46</sup> which, unlike the classical conception of the *negotiorum gestio*, no longer required – in certain circumstances - the intention to act in the interest of another (*animus*

<sup>45</sup> D. 12.6.14 and D. 50.17.206; P. Gallo (1992) 40 *American J Comp Law* 438; D. H. Van Zyl 1992 *Acta Juridica* 115-118.

<sup>46</sup> For example the early glossator Martinus Gosia and his followers tried to adopt as the general enrichment action a particular variant of the action for unauthorised administration – namely the *actio negotiorum gestorum utilis*. The difference from the normal remedy for management of another's affairs consist in the fact that it no longer requires the plaintiff to have acted with the intention of obligating another to himself. Martinus deduced this from the text in D. 3.5.5.5., that there is room for such an action within the Roman system. For example, in D. 3.5.5.5 the manager interferes with another's affairs simply in order to make a profit for himself. In spite of this malicious intention he is nevertheless allowed to sue the principal, albeit not in order to obtain compensation, but merely in order to obtain the amount of the enrichment, if any, which has accrued to the principal as a result of the manager's operation. Even if the required intention to bind the principal is lacking, there are two other reasons which, according to Martinus, can justify granting the remedy: the principal himself could have been compelled to perform the same (management of another's affairs *re ipsa*) or the operation appeared eventually to be beneficial for the principal (management of another's affairs *ipso gestu*). (See J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 41).

*aliena negotia gerendi*); and the *actio de in rem verso*<sup>47</sup> as well as the *condictio*<sup>48</sup> were extended far beyond their original field of application.<sup>49</sup>

In the context of generalizing the law relating to unjustified enrichment, the medieval lawyers concentrated their attention on three main problems: (i) a good faith improvement of the property of another; (ii) appropriation of value by using or disposing of the goods of another; (iii) indirect enrichment.<sup>50</sup> This tendency to extend the original remedies opened the way to the development of a general remedy of unjust enrichment,<sup>51</sup> but its achievement took until the very end of the nineteenth century.<sup>52</sup> The general

<sup>47</sup> The first impetus to 'stretch' the applicability of the *actio de in rem verso* dates back to the periods of the early glossators. We find for example that in C. 4.26.7.3 an action is granted against a third party who is enriched by means of a contract entered into by an intermediary. Although this intermediary is a free person and not a slave or a son *in potestate* of the third party, some glossators consider the action granted to be an *actio utilis de in rem verso*. (J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 42).

<sup>48</sup> Like in the case of *de in rem verso* already some early glossators read for example in D.12.1.32 a special use of the *condictio*, which no longer required a *negotium* (dealing, transaction) between plaintiff and defendant. The text grants an action for the mere reason that my money has come into your hands and that it is right and equitable (*bonum et aequum*) that you should refund it. Despite that early flexibility, however, it only in the fourteenth century that this special *condictio* ex D.12.1.32 is adopted as a general enrichment action. We find by this time, for example Baldus who speaks about a general equity (*aequitas generalis*) in the following terms: 'haec est etiam aequitas generalis, quocumque casu representata parit actionem generalem, scilicet certi conditionem, quod est notandum' and later commentators follow him. It is, however, acknowledged that this action is not by this time termed an enrichment action, but it is qualified as *condictio sine causa*, *condictio certi generalis*, *condictio ex aequitate* or as an *actio in factum ex aequitate*. (see generally J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 43-44. For the general teaching of Baldus on unjust enrichment, see J. Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991) 55-57.

<sup>49</sup> P. Gallo (1992) 40 *American J Comp Law* 439; D. H. Van Zyl 1992 *Acta Juridica* 115 et seq.

<sup>50</sup> P. Gallo (1992) 40 *American J Comp Law* 439. One should note for example the jurists from the French School at Orleans that started soon after the period of the Ordinary Gloss granting enrichment remedies, which no longer clearly connected with a specific Roman-quasi contract. Following the example of Martinus, these jurists among which there is Pierre de Belleperche, base for example the *condictio incerti* or *condictio possessionis* on equity and speak, for instance, about the *actio in factum ex aequitate*, which he is willing to grant for cases of necessary management of another's affairs, when on the ground of C.2.18.28 it is not possible to bring the *actio negotiorum gestorum* because the manager acted against the principal's explicit prohibition (See generally J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 42); D. H. Van Zyl, *Negotiorum Gestio in South African Law* (1978) 24-48).

<sup>51</sup> Amongst those that advocated the general enrichment action either explicitly or implicitly in The Netherlands and/or France are: Grotius, *Indeilinge* 3. 30.18; Voet, *Commentarius* 12.7.2; R. J. Pothier, *Appendice sur la gestion d'affaires* (an Appendices to his *Treatise on the Contract of Mandate*) 193. where Pothier says: 'Dans notre jurisprudence française, qui n'admet pas les subtilités de droit romain, et qui regarde la seule équité comme suffisante pour produire une obligation civile et pour donner une action, il ne doit pas être douteux que ...celui qui a fait des impenses dont je profit doit avoir action contre moi, jusqu'à concurrence de ce que j'en profite'.

<sup>52</sup> P. Gallo (1992) 40 *American J Comp Law* 439.

action developed either from the *actio de in rem verso*,<sup>53</sup> or through the *condictio sine causa specialis* or the extending of the *actio negotiorum gestio*.

Thus, today, many countries in Continental Europe (as well as other countries inspired by the civil law) have adopted a general enrichment action either by means of incorporating it into their codes or through jurisprudence. The essence of the civilian approach to unjustified enrichment is to be found in the notion of *sine causa* transfer.<sup>54</sup> *Sine causa* is understood as the ‘absence of a legal ground’ which implies that either the ground (*causa*) did not exist when the transaction occurred to sustain the validity of the ‘transfer of the benefit’, or, if it ever existed, it has since ceased to exist<sup>55</sup> (an *actio ob causam finitam*). It is common knowledge that civil law jurisdictions are not homogenous in their approach to unjustified enrichment. It is nonetheless true that all of them share the negative approach<sup>56</sup> to found a claim in unjustified enrichment. By negative approach is meant that it must be proved that there is no ‘causa’ (hence the terminology ‘*sine causa*’ and ‘unjustified’ used in the civilian systems), i.e., a legally recognised ground for the defendant to retain the enrichment ‘transferred’ to him. Put differently, all civilian systems begin from the proposition that every enrichment at another’s expense either has an explanation known to the law (a *causa*) or has not.<sup>57</sup> Enrichments are ordinarily transferred with the purpose of discharging an obligation or, if there is no such obligation, at least to achieve some other objective as, for example, making a gift, the satisfaction of

<sup>53</sup> Dawson, for example says that the *actio de in rem verso*, in the course of the eighteenth century, escaped all the limitations adhering to the *condictio* and *actio negotiorum gestorum* and became a ‘universal remedy for the prevention of unjust enrichment’ (J. Dawson, *Unjust Enrichment: A Comparative Analysis* (1951) 84-92 especially at 89-90).

<sup>54</sup> ‘Transfer’ here is used in a very loose sense, to include both an active and passive ‘transfer’. It encompasses not only an actual ‘transfer of the benefit from one person to another’ but also an acquisition by ‘omission’, i.e. the saving of expenses which would have been incurred in the absence of the act complained about. It also includes an increase of liabilities on the part of the plaintiff while the defendant decreases his liabilities due to the fact complained about.

<sup>55</sup> See further detail on the notion of *sine causa* in chapter 4 when dealing with the concept under Brazilian law.

<sup>56</sup> The opposite of the ‘negative approach’ is the common-law approach based on the ‘unjust factor’ which is discussed further below at 1.1.2.1 and elsewhere throughout the thesis.

<sup>57</sup> Lots & Brand ‘Enrichment’ in *LAWSA* Vol. 9, 2<sup>nd</sup> Edition (2005) § 209(d); R. Zimmermann, *The Law of Obligations* (1990) 834, and (1995) 15 *Oxford JLS* 403, 411, P. B. H. Birks, *Unjust Enrichment* (2005) 102-103; D. P. Visser, *Unjustified Enrichment* (2008) 171ff; J. E. Du Plessis (2005) *SALJ* 142, 155-59. Du Plessis observes that though there is unanimity about the absence of legal ground (*causa*) in civil law in general, the meaning and content of that legal ground (*causa*) varies considerably within the civil law family. See special at p. 157 of the above Article where Du Plessis gives French and Dutch examples.

a condition, or the coming into being of a new contract.<sup>58</sup> If these outcomes succeed, then the enrichment is sufficiently explained, i.e. it is obtained *cum causa*. If the enrichment turns out to have no such explanation it is inexplicable; therefore it cannot be retained.<sup>59</sup> The recipient is not entitled to it. It must be disgorged. The retention of it would be '*sine causa*'. The consensus, however, ends here. When it comes to defining what the measure of enrichment is, viz, whether it is the object received itself or its value which should be returned, and, if the enrichment ceased to exist, what should be done, civil-law countries start drifting apart again. Differences also exist as to the moment of assessment of the enrichment measure, whether it is the moment the object was received or at *litis contestatio*. At the risk of oversimplification, I would say that what we actually find in civil-law jurisdictions today is, for convenience sake, what I broadly call as the 'Pothier' and the 'Glück-Windscheid' schools. The issue sometimes goes down to the structure of enrichment law itself. To the Pothier school belong those who sustain the idea that enrichment law should emphasise 'value received' as the 'sole' measure of enrichment (thereby denying implicitly or partially a change of position defence). The Glück-Windscheid<sup>60</sup> school covers all those who defend the idea that enrichment law should concentrate on value surviving, rather than value received, save exceptions.<sup>61</sup> Obviously, there are intermediate positions between these two camps. The other school, adopting Pothier's perspective of the field as a whole, tends to deal extensively with '*paiement de l'indue*' (undue payment) apart from *negotiorum gestio*. Though there is diversity of thought in the Pothier's school as to the place of all other enrichment situations<sup>62</sup> and the requirement of error, the general trend is that the nature of the enrichment claim does not

<sup>58</sup> Current Canadian law call all these situations and others as 'juristic reasons' (See *Garland v Consumer Gas Co.* [2004] SCC 25; (2004) 237 DLR (4<sup>th</sup>) 385.

<sup>59</sup> In South African law Visser (*Unjustified Enrichment* (2008)173-174) poses a question whether one should only consider the '*causa retinendi*' or also the '*causa dandi*' and how to categorise the notion of '*causa*' in the face of the recognition that an invasion of rights can give rise to enrichment claims as well in cases of contracts discharged by supervening impossibility.

<sup>60</sup> Current adherents of the Glück-Windscheid school align with what was concluded back in time by Glück *Ausführliche Erläuterung der Pandekten* ad D 12.6 (§ 835) and Windscheid *Lehrbuch* vol. 2 § 424, that loss of enrichment applies both to a *genus* and to a *species*, and, therefore, loss of enrichment can be pleaded in all cases.

<sup>61</sup> Among the limitations generally advocated one would be that a *mala fide* recipient is always liable for value received, and where the enrichment claim arose as part of an (invalid) reciprocal contract, value received is also the right measure.

<sup>62</sup> See for example the discussion of the Brazilian law in this thesis, mostly appearing in chapter 4, which presents an enrichment law with dual structure: 'Undue payment' and 'enrichment *sine causa*'. See also the Dutch Civil Code (*BW*) using similar structure.

depend on the type of benefit conferred. In other words, civil-law countries do not have different restitutionary remedies arising from payment of money, the receipt of services and the delivery of goods.<sup>63</sup>

### 1.1.2. *Evolution of Unjust Enrichment in Common law Systems based on the English Tradition.*

Common law countries trace the foundations of their law of restitution (unjust enrichment) to the initial English extensions of *indebitatus assumpsit*<sup>64</sup> into the quasi-contractual remedies of *quantum valebat*, *quantum meruit* and the 'action for money had and received'. The recognition of *indebitatus assumpsit* itself as an action occurred sometimes earlier<sup>65</sup> but it was firmly endorsed in the *Slade*'s case.<sup>66</sup>

<sup>63</sup> R. Zimmermann (1995) 15 *Oxford JLS* 403, 411.

<sup>64</sup> '*Indebitatus Assumpsit*' in English legal literature means 'having become indebted he promised' (Birks *Unjust Enrichment* 2<sup>nd</sup> ed. (2005) 131). '*Assumpsit*' itself as a concept developed from the English 'action on the case' which was an English mimic of the Roman '*actio in factum*'. In Roman law itself the '*actio in factum*' was mostly a form of words without specific content. Nevertheless its pattern could, in principle, be adapted to any grievances. In the English version it took the form of the 'whereas' and the 'yet' clauses. The 'action on the case' could then be named in the various species. One of such nameable species, when the name was taken from the 'whereas' clause became the action on the promise (*assumpsit super se* = 'he undertook'), which was ordinarily expressed as: 'Whereas (...) the defendant undertook (*assumpsit*) ....yet he wickedly (...) did not pay to the plaintiff's loss'. Here we have the idea of promise. The sub-form of *assumpsit* in the 'debt-promise' format is the '*indebitatus assumpsit*' (in Latin). '*Indebitatus assumpsit*' had, in turn, its sub-forms according to the cause of the indebtedness. One of such sub-forms was 'money had and received to the use of the plaintiff'. (See generally D. Ibbetson 'Origins' (1982) 41 *CLJ* 142; See also P. B. H. Birks (1984) *Current Legal Problems* 1, 25 notes 10-12 for other historical sources); R. M. Jackson, *The History of Quasi-Contract in English Law* (1936) reprinted in (1986). (All citations on this work are from the reprinted version (Florida, 1986)); P. B. H. Birks, *Unjust Enrichment* 2<sup>nd</sup> ed. (2005) 284-290.; W. D. Evans, *Essays on the Action for Money Had and Received, on the Law of Insurance, and on the Law of Bills of Exchange and Promissory Notes* (Liverpool 1802), reprinted in (1998) *Restitution LR* 1-33.

<sup>65</sup> At least the year 1520 is the earliest date legal historians have indicated the action on *assumpsit* was used the first time. See J.B. Ames, *Lectures on Legal History and Miscellaneous Legal Essays* (1913) 142. For a detailed historical account of the action, see R. M. Jackson, *The History of Quasi-Contract in English Law* (1936) reprinted in (1986) 4ff and again at 40 and following pages.

<sup>66</sup> (1602) 76 ER 1072. The development of *indebitatus assumpsit*, according to English legal historians, passed through the following phases: (i) a consideration that the defendant must be indebted and must make a subsequent promise to pay; (ii) in the Queen's Bench the fact that the defendant was indebted on a simple contract was sufficient for the courts to imply a subsequent promise, specially from the time of *Edward v Burre*, (1573) Dal. 104, 145) but often the Court of Exchequer Chamber reversed such judgements; (iii) *Slade*'s case ((1602) 76 ER 1072) endorsed the practice of the Queen's Bench; (iv) soon afterwards, the action was extended to cases where the defendant was not technically indebted, but where there was a genuine contract. The action was not concurrent with debt immediately after *Slade*'s case, since the action rested on a promise implied in fact, the implication being made from the acts of the parties; the idea of

These quasi-contractual remedies offered some sort of solution to restitutionary problems resembling unjust enrichment, but they contained no organizing principle and, in any event, when available, they were subordinate and always subject to contractual principles.<sup>67</sup> These remedies were generally aimed at assisting a litigant in the situations where he had performed a contract which was void because of, say a necessary element was lacking such as full agreement on the consideration or the exact price.<sup>68</sup> In brief, while on the one hand *quantum meruit* came to the assistance of, for example, an innkeeper entitling him to be paid for services actually rendered, despite the lack of a previous agreement on the price to be paid, on the other hand, *quantum valebat* entitled, for instance, payment for their goods those who had delivered them in execution of a contract considered unenforceable, due to the lack of determination of the amount of the consideration, or for certain other reasons.<sup>69</sup>

The 'action for money had and received' developed mostly in symbiosis with the doctrine of waiver of tort.<sup>70</sup> This development happened before Lord Mansfield came to the Bench in 1750,<sup>71</sup> although he is sometimes wrongly credited with its invention.<sup>72</sup> By that

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consent was whittled away slowly, so that the duties imposed primarily by law, could only thus be enforced towards the end of the seventeenth century. (See generally R. M. Jackson, *The History of Quasi-Contract in English Law* (1986) 40ff).

<sup>67</sup> J. Beatson, *The Use and Abuse of Unjust Enrichment* (1991) 2-3.

<sup>68</sup> D. Ames (1888) 2 *Harvard LR* 58: 'Services would be rendered, for example, by a tailor or other workman, an innkeeper or common carrier, without any agreement as to the amount of compensation. Such cases present no difficulty at present day, but for centuries there was no common law action by which compensation could be recovered'. English writers and legal historians trace the origins of *assumpsit* to 1520, but its full endorsement occurred in 1602 in the *Slade's* case (1602) 76 ER 1072 and that of *quantum meruit* and *quantum valebat* to 1609 and 1610 respectively in the cases of *Warbrooke v Griffin* (1609) 2 Brownl 254 and *Six Carpenters* (1610) Rep. 147a. (See C. H. Fifoot, *History and Sources of the common-law* (1949) 393ff; P. B. H. Birks (1984) *Current Legal Problems* 1, 4.

<sup>69</sup> P. Gallo (1992) 40 *American J Comp Law*, 435; R.M. Jackson, *The History of Quasi-Contract in English Law* (1986) 27, 88 and 105.

<sup>70</sup> 'Waiver of tort' is a mechanism by which a claimant 'ratifies' the behaviour of the wrongdoer and asks for the money made by the wrongdoer as consequence of the tort (delict), instead of claiming damages. W. A. Keener (*A Treatise on The Law of Quasi-Contract* (1893) 159) expressed such notion in the following words: 'If any one in the commission of a tort enriches himself by taking or using the property of another, the later may, in some cases, instead of suing in tort to recover damages for the injury done, sue in *assumpsit* to recover the value of that which has been tortiously taken or used. The remedies in tort and *assumpsit* not being concurrent, a plaintiff is compelled to elect which remedy he will pursue; if he elects to sue in *assumpsit*, he is said to waive the tort'.

<sup>71</sup> For authorities before Lord Mansfield see H. Cohen (1932) 45 *Harvard LR* 1333, 1334 footnote 3, citing among others *Hussey v Fiddall*, 12 Mod. 324 (1770); *Lamine v Dorell*, 2 Ld. Raym. 1216 (1706) (waiver of



time it had been held that a plaintiff might waive a tort and sue in *assumpsit*; he could sue for money had and received to his use, for money paid on consideration which had failed, and for money paid under mutual mistake.<sup>73</sup> The doctrine of waiver of tort was introduced in order to escape the rigidity and formalism of tort<sup>74</sup> as well as that of contract law.

This system of waiver of tort introduced a more flexible mechanism into the common-law. The evolution of the common law of restitution in the twin context of contract and tort gave rise to a system of restitutionary remedies resembling more contractual and tortious configurations, rather than a truly autonomous system of unjust enrichment remedies. That is so because for a quasi-contractual obligation in the old English law to exist, it did not require proof of an unjust enrichment, but the ‘proof’<sup>75</sup> of a request or acceptance of the wares or services performed (*acceptio*).<sup>76</sup> This notion of request and acceptance still prevails in current common law. Its survival is made clearer if one looks at the scenario of services rendered in the form of un-requested improvements in today’s common law. The standpoint of the common-law is that a person who improves the property he knows belongs to another is viewed as a volunteer who is making a gift.<sup>77</sup>

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tort); *Hasser v Wallis*, 1 Salk. 28 (1708) (money had and received); *Holmes v Hall*, Holt 36 (1695) (failing consideration); *Tomkins v Bennett*, 1 Slk. 22 (1693) (mistake).

<sup>72</sup> Several common law writers hold that a remedy was developed in this sense by the possibility of waiving the tort, as acknowledged for the first time by Lord Mansfield. The same holding is also acknowledged by P. Gallo and he also thought that Lord Mansfield was the first one to elevate the waiver of tort to the podium (P. Gallo (1992) 40 *American J Comp Law* 435-37).

<sup>73</sup> H. Cohen (1932) 45 *Harvard LR* 1333, 1334.

<sup>74</sup> In origin tort liability came to an end as a consequence of the death of the wrongdoer (*actio personalis moritur cum persona*). In order to escape this rule, the waiver of tort was introduced enabling the ratification of the behaviour of the wrongdoer and asking for money obtained as a consequence of the tort instead of seeking damages. For example, in case of conversion, if someone sells the goods of another, the owner by waiving the tort, it was possible to be compensated even after the death of the wrongdoer; it is still possible to waive the tort. In this way it is possible to choose between claiming damages or asking for the money obtained as a consequence of the wrong committed.

<sup>75</sup> The ‘proof of request and acceptance’ in this context was a mere allegation, an authentic fiction which did not require an actual proof. *Moses v MacFarlan* 2 Burr 1005, 1012 (1760) exemplifies this fiction. Gerhard McMeel, for example, acknowledges that ‘in quasi-contractual cases the plea of the promise was entirely fictional and could not be denied by the defendant’ (G. McMeel, *The Modern Law of Restitution* (2000) 30).

<sup>76</sup> P. Gallo (1992) 40 *American J Comp Law* 433.

<sup>77</sup> This view in my opinion seems to echo a modified form of D. 50.17.53 which says: ‘Cuius per errorem dati repetitio est, eius consulto dati donatio est’ (repetition lies for what is given in error but what is given knowing (that is not due) is a gift). It is enough here to twist the requirement of ‘knowledge’ assimilated to the idea of gift to come to such an approach.

The improver's expectation of remuneration, if any expected, merely indicates that in bestowing this gift, the improver is also taking the risk that the owner will pay for it.<sup>78</sup> The common law usually sees no reason to reverse the gift or reallocate the risk through an award of restitution.<sup>79</sup> Because the improver knows that only owners have the right to determine the condition of what they own, the improver is taken to know that the improvement cannot oblige the owner to pay for it. Hence the improvement counts as nothing more than a donative act. In other words, as Hanoch Dagan<sup>80</sup> puts it, 'without a legal guarantee, a potential benefactor – who needs to decide whether to intervene before he is able to receive the beneficiary's binding commitment that he will indeed reimburse him – must take into account that his well-intentioned intervention could be abused'.

This common-law approach to improvements is premised on a liberal value system for it regards negative liberty, or 'freedom from' forcible human interference, as the essential (although it is not necessarily the ultimate value) ingredient to personal development and autonomy. Because each individual is distinct and unique, the common-law thinks that each such an individual should also be able to choose his goals voluntarily (as well as the means of achieving such goals) and should be held responsible for such choices. Any trespassing on that sphere of liberty should always be viewed with suspicion, and preferably, deterred.<sup>81</sup> On that basis, therefore, according to the common-law, individuals

<sup>78</sup> See for example *Greenwood v Bennett* (1973) 1 QB 195 (CA); and for unrequested improvement generally see P. Matthews (1981) 40 *CLJ* 340.

<sup>79</sup> G. Virgo, *The Principle of Law of Restitution* (2006) 55-58.

<sup>80</sup> H. Dagan (1999) 97 *Michigan LR* 1152, 1164.

<sup>81</sup> The extreme anti-interventionist rules currently prevalent in most common law jurisdictions knows some exceptions, namely, the doctrine does not apply in maritime salvage cases for which the law has a separate elaborate regime applying to those cases, and whenever what is at stake is the preservation of life or health. Whenever rescuing life or preserving health is at stake, common law generally has traditionally treated somewhat more liberally the benefactors in such cases than those who preserved only a proprietary or financial interest of another. Fundamentally the difference lies in the nature of the 'resource' involved. Between civil-law and common law there is a fundamental difference not only between the nature of the resource involved, but especially as regard to the significance of the intervention. Such difference encompasses the 'ultimate success' test for one legal family and the 'reasonable diligence' test for the other family. While it is a prerequisite of Anglo-American law for allowing 'good Samaritan' claims - except in cases of life and limb – that the claimant's effort to protect or preserve the defendant's interest meet with actual success, as a fruitless intervention, even if reasonable, cannot be said to produce any net value for the defendant (i.e; an enrichment), and the reasonable person could, in any event, say that he would only have been willing to pay for a result, not an attempt, if one were to apply the 'bystander' test; in contrast, under civil-law jurisdictions, the 'good Samaritan' is not required to demonstrate 'ultimate success', as long as he can show that he acted with 'reasonable diligence'. (For further details on the issues see: S. Eiselen & G.

should be entitled to control of their resources, at least in so far as they do not actively harm others in exercising such control. As a corollary to such control, their actual consent – express or implied, but, in all events, actual and not legally imposed – should be the prerequisite to any legitimate transfer of, or interference with, any of their resources.<sup>82</sup>

As instances of unsolicited improvements and the benefits conferred thereby threaten potential beneficiaries' control over their resources, thereby interfering ultimately with their free will, a legal system that takes seriously peoples' negative liberty must equally adopt the potential beneficiary's viewpoint. In so doing, such legal system must require that these potential beneficiaries be the gatekeepers of their own affairs, and whoever officiously confers unrequested benefits upon them is at the best to be viewed as a volunteer bestowing a gift or, at worst, as simply a risk taker.

Since the end of the 19<sup>th</sup> century, however, Anglo-American lawyers begun to reconsider the whole field of restitution starting with the pioneering historical research on *assumpsit*<sup>83</sup> and other *quasi-contractual* analyses especially in America.<sup>84</sup> They tried to unify all quasi-contractual remedies described above. The process continued and accelerated throughout the last century with the landmark issue of the American *Restatement of Restitution* in 1937, followed by other invaluable works both in America and other common law jurisdictions, amongst which John Dawson, *Unjust Enrichment* (1951); Robert Goff and Gareth Jones, *Law of Restitution* (1966);<sup>85</sup> George Palmer, *Law of Restitution* (1978); Peter Birks, *Introduction to the Unjust Enrichment* (1985). All these works in one way or another have emphasised the need for a unified principle for the whole law of restitution. Such unifying principle has largely been found in the general

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Pienaar, *Unjustified Enrichment* (1999); J. Dawson (1961) 74 *Harvard LR* 817, 823; P. Gallo 'Remedies for Unjust Enrichment in the History of Italian Law and in the Codice Civile' in E. Schrage (Ed) *Unjust Enrichment: The Comparative Legal History of the Law of Restitution* (1995) 275, 279.

<sup>82</sup> H. Dagan (1999) 97 *Michigan LR* 1161-1162.

<sup>83</sup> D. Ames (1888) 2 *Harvard LR* 58.

<sup>84</sup> See H. Cohen (1932) *Harvard LR* 1333 for several works on *Quasi-Contracts* preceding the *Restatement of Restitution* 1937. Amongst the most salient the author cites W. A. Keener, *A Treatise on the Law of Quasi-Contracts* (1893) and F. C. Woodward, *The Law of Quasi-Contracts* (1913).

<sup>85</sup> R. Goff and G. Jones, *The Law of Restitution* 1<sup>st</sup> Ed. (1966) and all subsequent editions up to the 7<sup>th</sup> Edition (2007) reaffirm the same position that 'unjust enrichment' is at the foundation of the 'law of restitution'.

principle that no one should be enriched without reason at the expense of another,<sup>86</sup> a principle whose origin can be traced back to Roman law.<sup>87</sup>

The clear recognition of the general enrichment principle in English law came in a unanimous judgment of the House of Lord in 1991, *Lipkin Gorman v Karpnale*<sup>88</sup> case. This case recognised simultaneously the general principle against unjust enrichment as well as the general defence of change of position. The facts of the case are well known: Cass, a solicitor and partner at a law firm, was a gambling addict, and a thief. He took £323 222.14 from his firm's client account and used this money to finance his gambling addiction at the defendant's club, the 'Playboy Club'. It is thought he may have intended to return the money, but in the end he was only able to replace £100 313.16. The balance of £222 908.48 could not be recovered from Cass. In total, he staked £561 014.06 at the club, and won £378 294.06. The overall loss suffered by Cass over the period of his activities were calculated to be £174 745.00, of which it was agreed that £20 050.00 represented his own funds. Having the court accepted that the club was liable to the solicitors in unjust enrichment, thereby recognising that this principle formed part of English law, the question was whether they should be liable for £200 000.00 or for the amount of £150 000.00. It was held that they were liable for the latter sum. This conclusion was based on the defence of change of position.

<sup>86</sup> *Restatement of Restitution* § 1 (1937); P. B. H. Birks, *Introduction to the Law of Restitution* (1985) and P. B. H. Birks, *Unjust Enrichment* 1<sup>st</sup> Edition (2003) and 2<sup>nd</sup> Edition (2005) [the two last books of Peter Birks differ substantially from his first book published on the subject in 1985 and reprinted in 1989]; R. Goff & G. Jones, *The Law of Restitution* (2007), chapter 1. But see among others, the following authors resisting the generalisation of such a principle to the whole law of restitution: M. P. Gergen (2001) 79 *Texas L.R.* 1927; S. Stoljar (1987) 50 *MLR* 653; S. Hedley (1985) 5 *Legal Studies* 56; S Hedley, *Restitution: Its Ordering and Division* (2001); Atiyah is clearly opposed to the centrality of the notion of unjust enrichment, for despite recognising the importance of such principle against unjust enrichment, he believes that it should not be elevated to a separate legal subject but viewed instead as a principle running through several existing subjects such as property law, tort law and most importantly, contract law (Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 767-768).

<sup>87</sup> Pomponius D 12.6.14; D 50.17.206.

<sup>88</sup> *Lipkin Gorman v Karpnale* (1991) 2 AC 548 especially at 558 (per Lord Bridge), at 559 (per Lord Templeman) and at 568 (per Lord Ackner), and 578 (per Lord Goff). Lord Grittifs concurred with Lord Templeman and Lord Goff. The case was again endorsed in *Banque Financière de la Cité v Parc (Bettersea) Ltd* [1999] 1 AC 221 (HL).

Lord Goff, whose judgment has become more influential than that of Lord Templeman, as far as the defence of change of position is concerned, succinctly put the matter this way:

‘At the moment I do not wish to state the principle any less broadly than this: the defence (of change of position) is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full’.<sup>89</sup>

Since the House of Lords decision in the *Lipkin Gorman* case, the English law of restitution in particular (and that of the whole common law, in general) has developed exponentially. Both the extent of the enrichment principle and its basis and the scope of the change of position defence have been scrutinized in subsequent cases and academic writings. Judicially, subsequent cases to *Lipkin Gorman* such as *South Tyneside Metropolitan Borough Council v Svenska International Ltd*,<sup>90</sup> *Philip Collins v Davis*,<sup>91</sup> *Scottish Equitable v Derby*,<sup>92</sup> *Dextra Bank & Trust Co Ltd v Bank of Jamaica*,<sup>93</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd*,<sup>94</sup> among others, sought in one way or another to delineate the scope and operation of change of position defence. As regard the enrichment principle itself, cases such as *Hazell v Hammersmith & Fulham BC*,<sup>95</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC* and *Kleinwort*

<sup>89</sup> Ibid. at 580.

<sup>90</sup> *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545.

<sup>91</sup> *Philip Collins Ltd v Davis* [2000] 3 All ER 808.

<sup>92</sup> *Scottish Equitable plc v Derby* [2000] 3 All ER 793.

<sup>93</sup> (2002) 1 All ER (comm.) 192. (This is a Privy Council case, appealed from the Caribbean Dominions).

<sup>94</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* (1999) 2 NZLR 211 (a New Zealand case of general interest on the defence of change of position with its approach to negligence).

<sup>95</sup> *Hazell v Hammersmith & Fulham BC* [1992] 2 AC 1 (HL). This case is said to have been the real ‘trigger’ of the full change in English law, because in this case the House of Lords let it be known that billions of pounds had changed hands under void contracts (in both the closed swaps and the interrupted swaps). The House of Lords decided that the contracts of interest swaps made by the local authorities were not within the authorities’ money management powers and were consequently void. As such and with no exception it required mutual restitution, with the effect that the winner, the party who had received the greater sum, has had to repay the winning difference (See generally P. B. H. Birks, *Unjust Enrichment* (2005) 109). The effects triggered by this case are described as follows by Goff & Jones: ‘The House of Lords held that the transactions were *ultra vires* the local authorities that had entered into them. Legitimate commercial transactions were thereby undermined. Predictably there followed a spate of litigation. Two cases were selected as test cases: *Westdeutsche v Islington* and *Kleinwort Benson v Sandwell*. Important questions of restitution were raised before the judge and the Court of Appeal. But before the House of Lords the appellant (Islington) conceded that it was liable to make restitution. Therefore the appeal was confined to the question of interest’ (R. Goff & G. Jones, *The Law of Restitution*, 6<sup>th</sup> ed. (2002) § 25-014). The chain of reaction was, however, released by its conclusion that the transactions were *ultra vires* and therefore void. The basis upon which the transactions took place had failed to sustain itself and the

*Benson Ltd v Sandwell BC*,<sup>96</sup> *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London BC*<sup>97</sup> (commonly known as the ‘swaps’ cases’) sowed the seeds for a rapprochement of the common-law with civil-law. As the mistake of law rule has also been abrogated<sup>98</sup> and the ‘unjust factor’ mistake (and possibly all other recognised unjust factors until then) failed squarely to explain the case of restitution of illegally charged taxes in the *Woolwich*<sup>99</sup> case, it created the opportunity to introduce the ‘absence of basis’ thinking into the English law of unjustified enrichment. The swaps cases and others<sup>100</sup> gave much needed ammunition to Peter Birks<sup>101</sup> (and probably others) to argue for the abandonment of the unjust factor<sup>102</sup> approach as the basis of enrichment claims in English law<sup>103</sup> and replacing it with the ‘absence of basis’ at the top of his pyramidal structure<sup>104</sup> (albeit a pyramid whose base can theoretically still encompass some of the traditional ‘unjust factors’).<sup>105</sup>

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defendant could not retain the benefit received because the ground for retention that apparently initially existed, in fact did not exist. This is another way of saying the retention would be ‘without legal ground’.

<sup>96</sup> *Westdeutsche Landesbank Girozentrale v Islington LBC*; *Kleinwort Benson Ltd v Sandwell BC* [1994] 3 All ER 890 (CA); [1996] AC 699 (HL).

<sup>97</sup> [1999] QB 215 (CA).

<sup>98</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349.

<sup>99</sup> *Woolwich Equitable Building Society v IRC* [1993] 1 AC 70 (HL). The implications of the *Woolwich* principle are explored in detail in chapter five below, when dealing with the passing-on defence.

<sup>100</sup> *Woolwich Equitable Building Society v IRC* [1993] 1 AC 70 (HL).

<sup>101</sup> P. B. H. Birks, *Unjust Enrichment* 2<sup>nd</sup> Ed. (2005) 115-116.

<sup>102</sup> I discuss the unjust factor reasoning in the next heading (1.1.2.1 ‘Unjust Factor: Yesterday and Today’). Further discussion of the unjust factor approach will appear elsewhere when discussing the Canadian adoption of the ‘absence of juristic reason’ approach and the rationale why the Americans show no interest in the debate of ‘unjust factor’ versus ‘absence of basis’ (chapters 2 and 3 below).

<sup>103</sup> Although he cautions that the new approach will be different from the civilian interpretation, Birks himself describes the ‘demise’ of the unjust factor approach in this way: ‘The assertion of Englishness is not an outburst of chauvinism. It is merely a warning that, although the no basis approach is very civilian and although there is now guidance to be obtained from civilian jurisdictions, what has happened is not a passive reception of German and French law to fill a vacuum. Lord Mansfield did indeed do some borrowing of that kind from the *ius commune*. By contrast, the modern English judges have simply been drawn to an approach to “unjust” which, with hindsight, is both incompatible with the list of unjust factors with which they were previously managing and reflects the method which, in different sub-forms, is already familiar in civilian jurisdictions. This time there is no evidence in the cases of deliberate borrowing’ (Birks, *Unjust Enrichment* (2005) 128). Thereafter Birks devotes the whole chapter 6 (pp 129-160) to the absence of basis analysis. It is also instructive to read his own Preface to the Second Edition dated 14 March 2004.

<sup>104</sup> P. B. H. Birks, *Unjust Enrichment* 2<sup>nd</sup> Ed. (2005) 115-116.

<sup>105</sup> At this moment, some theorists are of the view that the ‘unjust factor approach’ has been completely discarded, with the only task remaining that of re-aligning the interpretation of the precedents in which the whole system was based; but many others are still adamant that ‘unjust factors’ have still a vital role to play and that the English law of unjust enrichment is still firmly based on the positive approach. T. Krebs, a vehement defendant of the positive approach, notes, for example, that in light of the *Kleinwort Benson v*

Thus far the development after *Lipkin Gorman v Karpnale (The Firm)*<sup>106</sup> is an ongoing process. Some milestones have already been achieved, while others are awaiting the opportunity to arise, as is typical of the common law. In the conceptualisation of the change of position defence, the *Philip Collins*<sup>107</sup> case, for example, pointed out that the courts will not be unnecessarily demanding in respect of defendants who have insurmountable problems in proving reliance. This case, therefore, implies an interpretation of the defence which is more generous to the defendant. The *Svenska* case, on the other hand, is a test of the defence in anticipatory reliance situations. The merits and demerits of anticipatory reliance are discussed elsewhere in this work, but for the time being it suffices to note that anticipatory reliance was firmly rejected in *Dextra Bank & Trust Co Ltd v Bank of Jamaica*.<sup>108</sup> The *Scottish Equitable v Derby* case represents the scenario where it is asked whether a general hardship can found the change of position defence. The answer is clearly no. What is required to found the defence is a causal link between the original enrichment and the change of position. The New Zealand case *Waitaki*<sup>109</sup> is an example of an attempt of a legal system trying to balance the role of fault within the law unjustified enrichment. It introduces the notion of comparative fault, but most academics and decisions in other common law jurisdictions have already rejected the *Waitaki* approach as undesirable and theoretically unsound. Many other landmarks have already been attained and will be noted throughout this work especially if they bear any relationship with the topic of the thesis.

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*Lincoln City Council* (1999) 2 AC 349 (HL) case, the argument in defence of the unjust factor approach might be too late.

<sup>106</sup> For a good summary of developments after *Lipkin Gorman* case, see T. Krebs, *Restitution at the Crossroads* (2001), chapter 15 (pp 271-306); the same chapter is reproduced as chapter in another compilation-book edited by E. J. H. Schrage, *Unjust Enrichment and the Law of Contract* (2001) 295-336. As regard the general principle against unjust enrichment Krebs is in favour of maintaining the English 'unjust factor' approach. The same applies to M. McInnes that in the context of Canadian law is uncomfortable with the 'juristic reason' approach adopted in that jurisdiction.

<sup>107</sup> *Philip Collins Ltd v Davis* [2000] 3 All ER 808.

<sup>108</sup> (2002) 1 All ER (Comm.) 192.

<sup>109</sup> *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* (1999) 2 NZLR 211 especially at 229.

### 1.1.2. 1. 'Unjust Factors' - Yesterday and Today.

The proving of an 'unjust factor' has been, until now, the hallmark of the common-law of unjust enrichment distinguishing it clearly from the civil-law '*sine causa*' approach. At this moment in time, the situation (at least in English law) seems confusing, or, at a crossroad, as Waller LJ describes it in the *Guinness Mahon*<sup>110</sup> case. In my view, English law, (among common law countries) is currently a hybrid system uneasily allowing the coexistence of the 'unjust factor' approach with the 'absence of basis' approach in its enrichment law. Though not many theorists will readily agree with this proposition, the 'unjust factor' approach is, in my opinion, in a subtle process of being phased out completely from the English law of unjust enrichment. Thus far, however, the approach is still part of English law, at least in theory, and its signature marks are essentially the following: A claimant asking for restitution on the basis that the defendant has been enriched at his expense will have to show not only that the defendant was enriched and that the enrichment was at his expense, but also prove a 'positive element' (an 'unjust factor') which demonstrates that the enrichment was unjust.<sup>111</sup> The various unjust factors (or 'grounds for restitution' as Graham Virgo<sup>112</sup> calls them) sometimes are classified into several categories either on account of taxonomy, practical reasons or for tidier exposition.<sup>113</sup> Obviously there is no unanimity yet amongst English theorists on how to finally categorise the unjust factors and their list is open ended. In essence the field is still developing. Be that as it may, one commonly found approach is to group them into non-voluntary transfers (with the subcategories of 'no intent, impaired intent, and qualified intent'),<sup>114</sup> and a miscellaneous group commonly referred to as 'policy-motivations'.<sup>115</sup>

<sup>110</sup> *Guinness Mahon & Co Ltd v Kensington & Chelsea Royal London BC* [1999] QB 215, 233.

<sup>111</sup> Allusion has already been made elsewhere about the Canadian break away with its 'juristic reason' to which I shall return again at a later stage in this work. For fresh challenges on the 'unjust factor' in England see S. Worthington (2004) 12 *RLR* 267; and P. B. H. Birks himself in *Unjust Enrichment* 2<sup>nd</sup> ed. (2005).

<sup>112</sup> G. Virgo, *Restitution* (1999) 119-127. Virgo groups the grounds for restitution in three categories: (i) 'plaintiff-oriented grounds for restitution' (which includes (a) 'absence of intention', (b) 'vitiated intention', and (c) qualified intention); (ii) 'defendant-oriented grounds for restitution' (which include (a) exploitation, (b) free acceptance); and (iii) 'policy-oriented ground of restitution' (in this category falls the example of 'necessity' and the recovery of *ultra vires* payment from public authorities).

<sup>113</sup> One of the practical reasons is the attempt to reign on the untidiness of the subject inherited from the way the whole field developed in common-law jurisdictions.

<sup>114</sup> In his last book Peter Birks described the traditional English unjust factors from the Mansfield/Blackstone presentation (which included mistake, failure of consideration, shades of fraud or pressure, and taking advantage of vulnerable people) to the modern tripartite controversial approach



The non-consensual transfer group commonly comprises the following ‘unjust factors’: mistake, undue influence, ‘illegality’,<sup>116</sup> illegitimate pressure, ignorance,<sup>117</sup> personal handicap (such as minority, dementia, and illiteracy (in certain cases)), failure of consideration’. The sub-category of impaired intent (sometimes termed ‘unconscientiousness in receiving’) traditionally included ‘knowing receipt’, and the controversial ‘free acceptance’.<sup>118</sup> All other cases not fitting these two groupings may only qualify in unjust enrichment for policy grounds.<sup>119</sup>

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(‘intent based unjust factors’, ‘defendant-sided unjust factors’ and ‘policy-based unjust factors’). - Birks himself referring already to Burrows (‘Free Acceptance and the Laws of Restitution’ (1988) 104 *LQR* 576 and A Burrows *The Law of Restitution* 2<sup>nd</sup> Ed. (2002) 402-407) refers to the elimination of the defendant-sided category which was sometimes called ‘unconscientious of receipt’ or ‘free acceptance’ because such category proved to be the result of muddled thinking. Thus, this left only the field for two main categories: ‘Intent-based unjust factors’ and ‘policy-based unjust factors’ (Birks, *Unjust Enrichment* (2005) 41-43).

<sup>115</sup> P. B. H. Birks, *Unjust Enrichment* (2005) 107; R Goff & G Jones, *The Law of Restitution* (2007); M. Chen-Wishart (2000) 20 *Oxford JLS* 557, 559-560. Some writers such as G. Virgo do not follow this classification strictly; but in essence they adhere to the same principle that an unjust factor must be proved. Thus, Virgo discussing the ‘Role of Unjust Enrichment Principle in Practice’ states that ‘since the unjust enrichment principle will be applicable only where the plaintiff’s claim falls within one of the recognised grounds for restitution, such as *mistake, duress or total failure of consideration* (emphasis added), the better view that it should be sufficient for the plaintiff to plead that the defendant had been unjustly enriched at the plaintiff’s expense on the ground of mistake, or duress, for example, without needing to assert that the plaintiff’s claim falls within one of the forms of action’. (G. Virgo, *Restitution* (1999) 56. (NB. The 2006 edition does not depart from this proposition).

<sup>116</sup> Illegality mainly belongs to the policy motivations group. But it is also classified as a defence. Its final classification therefore may vary. In some cases its classification may depend on whether it is thought of as a ‘protective illegality’ or in other forms of illegalities. Illegality itself does not necessarily mean ‘contrary to public policy’ though in most cases it is contrary to public policy. The illegality of, say a contract, can be relevant to enrichment liability in at least two ways. First, it may act as a bar to restitution that would otherwise be available in connection with the contract: to this extent, Tottenborn, for example, argues that people enter into illegal agreements at their own risk (A. Tottenborn, *The Law of Restitution in England and Ireland* 3<sup>rd</sup> Ed. (2002) 168). Secondly, in another sense, illegality may actually create a right to restitution, namely where a contract is made illegal in order to protect one party. This last feature is often called ‘protective illegality’. One particular feature of the ‘protective illegality’ cases is that there appears to be no requirement of total failure even where it would normally apply to the claim in question. For further debates and contours of ‘illegality’ in English law see R. Goff & G Jones, *The Law of Restitution* 6<sup>th</sup> Ed. (2002) chapter 24 and literature cited there (There are no relevant changes on the issue in the 7<sup>th</sup> Edition (2007) of Goff & Jones’ *Law of Restitution* for our purpose). William Swadling, however, argues that ‘illegality is never a cause of action and that the decisions which appear so to hold can be explained on other grounds’ (Swadling, ‘The Role of Illegality in the English Law of contract’ in W. J. Swadling (ed.) *Unjust Enrichment* 289; R. Goff & G. Jones, *The Law of Restitution* (2002) § 24-003 footnote 37a).

<sup>117</sup> Some writers classify ignorance as a subset of personal handicap. Many others disagree with such classification. In any event, if ignorance is seen from the perspective of being ‘vulnerable to be taken advantage of’ for not knowing, then it might be analogous to ‘frailty of mind’ and may resemble ‘handicap’. But that might be pushing the envelope too far. Objectively it is not a handicap.

<sup>118</sup> The term ‘free acceptance’ was coined by Goff and Jones, *The Law of Restitution* (1966) 30. Peter Birks alongside Goff and Jones became the most ardent advocates of the concept, but Jack Beatson and Andrew Burrows, among others rejected it. The controversy is of no consequence for our purpose. For details of the controversies surrounding the concept, especially the Birks-Burrows’ debate see a useful summary in G. McMeel, *The Modern Law of Restitution* (2000) 217-223 and literature cited there. See

The angle of the enrichment claims at common law is also different from that of civil law. In the common law the enrichment will be retained unless an ‘unjust factor’ (a positive element) is proved why it should not stand where it currently lies; in contrast, in civil law the approach is that the enrichment shall not remain where it currently lies *sine causa* (a negative element). It shall only remain there if it was acquired under a valid legal ground (a disposition of law, a contract, under delictual (tort or ‘civil responsibility’) action, etc, or as gift<sup>120</sup>). For the common-law the unjust factors describe a pragmatic manner when an enrichment claim is available. It is only when precedents run out that the courts may resort to higher-level principles in order cautiously to extend the categories of recognised unjust factors.<sup>121</sup> According to some English theorists the list of unjust factors is not closed, and the courts will always be able to formulate new unjust factors which support an enrichment claim in appropriate case.<sup>122</sup>

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further G. Virgo, *The Principles of the Law of Restitution* (1999) 79-86; R. Goff & G. Jones, *The Law of Restitution* 6<sup>th</sup> Ed (2002) § 20-051; § 1-021; §§ 1-019-022; §§ 1-034-037.

<sup>119</sup> Illegality and necessity cases (encouraging useful interventions) belonged to this policy motivations group. All these three groupings were mostly the birth-children of Peter Birks before he changed his mind in his last book and supported the idea that ‘there is only one unjust factor’ and says: ‘Heavy-weight cases have adopted the ‘no basis’ approach. The ‘general doctrine’ is that enrichment at another’s expense has to be given up if it lacks any explanatory basis’ (P. B. H. Birks, *Unjust Enrichment* (2005) 108).

<sup>120</sup> It is to be remembered that under most civil law systems a gift is ‘a contract’, differently from the common-law approach. This issue is particularly important in the conceptualization of *negotiorum gestio* where common law in general considers unauthorized administrators (*gestors*) as ‘intermeddlers’ in other people’s affairs and therefore gift-makers who should not be compensated, save in special circumstances. (For a good summary see among others, H. Dagan (1999) 97 *Michigan LR* 1152) referred to earlier in this work. For other Civil law systems see for example the French approach in John Bell, S. Boyron & S. Whittaker, *Principles of French Law* 2<sup>nd</sup> Ed. (2008) 423-426.

<sup>121</sup> For some theorists the modern example of English courts recognizing a new unjust factor is *Woolwich* case ((1993) 1 AC 70 (HL)). (See T. Krebs, *Restitution at the Crossroad* (2001) 307; S. Hedley, *Restitution: Its Division and Ordering* (2001); but contrast this view with that of P. B. H. Birks, *Unjust Enrichment* (2005) 133, who clearly says that ‘in England, in *Woolwich* case a similar scenario (reference to the Australian case *Mason v New South Wales* (1959) 102 CLR 108 (HCA)) played out on facts which did not admit of reliance on duress or any other impairment of intent, so that the outcome had to be made to turn on an unjust factor from the other family, namely ‘policy motivations’. Birks concludes, as everyone now accepts, that the payment in *Woolwich* case ‘was simply a payment made to discharge a non-existent debt’, viz, an ‘undue payment’, or a payment ‘without basis’. With P. B. H. Birks agrees also A. Burrows, *The Law of Restitution* (2002) 509; See equally *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (HL) and *Nuridin & Peacock plc v DB Ramsden & Co Ltd* [1999] 1 All ER 941.

<sup>122</sup> See T. Krebs above and many authorities cited there.

In short, while the common law with its 'unjust factors' looks mainly to discover a defective or an incomplete intent to undo the transaction, civil-law systems mainly emphasise disentitlement.

### 1.1.3. Concluding Remarks.

It is undeniable that if one looks comparatively at the history of the law of unjust/unjustified enrichment in the common-law and civil-law, some clear differences are noticeable. In spite of those developmental differences, and some persistent voices to the contrary,<sup>123</sup> there is now a growing consensus which both families recognise, regardless of whether it is directly or indirectly acknowledged, that '*iure naturae aequum est neminem cum alterius detrimento et iniuria fieri locupletiores*'.<sup>124</sup> It is acknowledged that this 'principle' is akin to representing an ideal rather than a practical rule of law and

<sup>123</sup> As pointed out elsewhere in this chapter, not everyone in the common-law world agrees with the need of a general principle against unjustified enrichment as the foundation of the whole law of restitution. The resistance is especially prominent in Australia where the influence of writers such as S. Stoljar, I. M. Jackman, R. Gratham and C. Rickett among others is heavily felt. See for example the approach in I. M. Jackman, *The Varieties of Restitution* (1998). A decade ago Brice Dickson ((1995) 54 *CLJ* 101, 126) equally noted that any direct comparison of the structure of unjust enrichment claims in common law and civil-law systems is bound to be misleading because, he also thought, that the principle against unjust enrichment serves different purposes in the two sets of systems. Despite these dissonant voices, it is my view that the convergence is to a certain degree inevitable. This assertion gains greater force if one also considers, as already alluded to elsewhere in this work, that the unqualified sustainability of the 'unjust factor' approach is almost doomed. See allusion made elsewhere in this work about the Canadian break away with the 'juristic reason' to which I shall return again at a later stage in this work. For fresh challenges to the 'unjust factor' approach in England see among others S. Worthington 'The New Birksian Approach to Unjust Enrichment' (2004) 12 *RLR* 267; and Peter Birks himself in *Unjust Enrichment* 2<sup>nd</sup> Ed. (Oxford, OUP 2005).

<sup>124</sup> Pomponius D 50.17.206 or D. 12.6.14 '*Jure naturae aequum est neminem cum alterius detrimento fieri locupletiores*'. For incarnation of the 'adage' in the civil-law systems see for example the development in French Law of the action described by Molinaeus as '*actio in factum ex aequitate*' which Pothier in *Appendice sur la gestion d'affaires* (Appendice to his *Treatise on the Contract of Mandate*) 191ff comments upon and referring to such gestion d'affaires by saying: 'dans notre jurisprudence française, ... qui regarde la seule équité comme suffisante pour produire une obligation civile e pour donner une action, il ne doit pas être douté (douteux) que ... celui qui a fait des impenses dont je profite doit avoir action contre moi, jusqu'à concurrence de ce que j'en profite'. For similar approach in German law the early use of the *actio de in rem verso* the provision in § 230 of the Prussian Code '*Allgemeines Landrecht*' of 1794 and § 233 on *negotiorum gestio* which are said to have been used nearly interchangeably and their application that virtually became a general enrichment action. (see generally D. L. de Campos, *A Subsidiariedade da Obrigação de Restituir o Enriquecimento* (Lisbon, 2003) 55-108; D.H. Van Zyl 1992 *Acta Juridica* 120 footnote 36; See equally B. Nicholas (1962) 66 *Tulane L R* 605, 618-623).

if mechanically adopted it may carry a legal system too far afield.<sup>125</sup> Consequently, because both legal families now recognise the principle as the foundation of unjust or unjustified enrichment claims, whether implicitly or explicitly, both systems are also now equally faced with the reality that it would, inter alia, be inequitable if an innocent and unsuspecting transferee were to be regarded in all circumstances as the plaintiff's insurer against every possible peril. How both systems have historically dealt with possible inequity will now be addressed.

## 1.2. History of change of position Defence Proper.

### 1.2.1. Civil-Law Systems.

In civil-law systems the defence of change of position is ordinarily known either as disenrichment or as loss of enrichment. Although some commentators contend that it is a novelty invented by the Pandectists,<sup>126</sup> its embryonic origin seems to go back to the ancient times in the interplay between the notions of distributive justice, commutative justice and corrective justice according to the Aristotelian *Nicomachean Ethics*.<sup>127</sup> Academics are not exactly sure, though, when it first surfaced in its modern form and they offer different accounts of its origin, though such accounts are not necessarily mutually irreconcilable. Some offer a more historical-philosophical approach to its origin,

<sup>125</sup> J. Dawson, *Unjust Enrichment* (1999 Reprint) 7-8.

<sup>126</sup> For example R. Zimmermann and J.E. Du Plessis ((1994) *RLR* 38-39 and R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 899ff) implicitly support this view when they, inter alia, say of BGB § 818 (III): 'Such a general rule limiting the defendant's liability to the actual enrichment at the time of *litispendente* was unknown in Roman law and the *ius commune*. It was only in the course of the nineteenth century, and in the work of tendencies to facilitate enrichment actions, that the reasonable reliance of the recipient to be able to keep what he has received appeared to require protection, and eventually it was not only regarded as manifestly equitable, but as inherent in the very nature of 'enrichment' liability, that a duty to make restitution existed only insofar as the recipient was (still) enriched'.

<sup>127</sup> *Nicomachean Ethics*, v 9, 1130b-1131a. According to Aristotle, while distributive justice gives each citizen a fair share of whatever resources a community has to divide, commutative justice preserves each person's share. In involuntary transactions, one who took or destroyed another's resources has to give back an equivalent amount. In voluntary transactions, the parties have to exchange resources of equivalent value. This distinction between involuntary and voluntary transactions which resembles the one drawn today between delict and contract, seems also to have been the linear ancestor of such distinction, that goes back to Gaius (*Gaius* 3.88), who according to many legal historians and scholars took it from Aristotle. See R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 10-11.

while others see to it as the necessary culmination of the assertion of a general principle of unjustified enrichment. If the effort of the late scholastics gave rise to the modern idea of unjustified enrichment as a separate body of law at the same level with contract and tort,<sup>128</sup> such an idea needed to be supplemented with a strong defence of change of position / loss of enrichment as a logical consequence. Although some jurisdictions, as we shall see throughout the thesis (and more specifically in chapter four), have opted to limit the ambit of such general principle by making the whole law of unjustified enrichment subsidiary to the other fields of obligations, the defence of change of position certainly plays a major limiting role in many systems. In any event, the concept of disenrichment (or change-of-position) appears prominently in the German BGB and several German authors<sup>129</sup> have devoted efforts to its clarification. Gordley,<sup>130</sup> analysing comparatively such notion in the BGB, expresses the view that the drafters of the BGB took it from the nineteenth-century Pandectists, especially Windscheid and Savigny, both of whom seem, in turn, to have taken it from members of the seventeenth-century and eighteenth-century natural-law school such as Grotius and Pufendorf. They, again, took it from a group centred in Spain in the sixteenth century and known to the historians as the late scholastics. The late scholastics came to the notion of loss of enrichment as a defence while discussing the implications of Aristotle's concept of commutative justice as it had been interpreted by Saint Thomas Aquinas. The latter was of the view that 'if the transaction was purely for the benefit of the person who received the property – for example a gratuitous loan - then compensation is due even if the property has been lost; if it was purely for the benefit of the owner - for example, a deposit, - then compensation is

<sup>128</sup> R. Feenstra, 'Grotius' Doctrine of Unjust Enrichment as a Source of Obligation: Its Influence in Roman-Dutch Law' in E. Schrage (ed.) *Unjust Enrichment* (1997) 197; and see especially Hugo Grotius, *Indeilinge tot de Hollandse rechts-geleerheid* 3.30.13. Some authors doubt that Grotius in this paragraph is discussing a formulation of a general principle, and hold that he was merely discussing the *condictio sine causa specialis*. There are however many other studies that seem to confirm that he was indeed discussing such a general principle, as did other authors elsewhere in the European *ius commune* on the same text, and other passages of the Digest. For a comprehensive studies of the concept of unjust enrichment in late scholasticism and the influence of that school of thought on Grotius see J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 87-103.

<sup>129</sup> For a summary of old authorities on whether non-enrichment is a defence to the *condictio indebiti*, especially in German law, see *King v Cohen, Benjamin and Co.* (1953) 4 SA 641 (W), by Steyn, J (as then he was). Staudinger-Lorenz § 818 No. 12; R. Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1990) 887-890. For the *condictio* in general see also F. R. Malan 1992 *Acta Juridica* 131-147.

<sup>130</sup> J. Gordley, 'Restitution Without Enrichment? Change of Position and *Wegfall der Bereicherung*' in D. Johnston & R. Zimmermann (eds.) *Unjustified Enrichment: Key Issues* (2002) 229-228.

not due except if the loss was caused by grave fault'.<sup>131</sup> Secondly, the recipient might be liable merely because he had another's property, regardless of how he had come by it (*ipsa res accepta*). According to Aquinas, commutative justice required that he gives it back.<sup>132</sup> In this last case, according to the late scholastics, and then Grotius<sup>133</sup> and Pufendorf,<sup>134</sup> a person who no longer has another's property should still be liable if he has become richer by having once had it. Such a person is liable only to the extent he is still enriched. Thus he is not liable if he consumed another's property or gave it away, except to the extent that he saved money he would otherwise have spent. He is also not liable if he bought and then resold another's property except if he made a profit.<sup>135</sup> Finally, James Gordley thinks that the late scholastics as well as Grotius and Puffendorf reached their conclusions by an exercise of setting some reasons aside. They first started by setting aside every other reason that the plaintiff might recover until all that is left is the defendant's enrichment by means of the plaintiff's resources. It is then a defence that the defendant is no longer enriched, but only if he no longer had the plaintiff's property and is not liable because of the way he had initially acquired it, whether wrongfully or with the plaintiff's consent.<sup>136</sup>

Daniel Visser,<sup>137</sup> reaffirms that the orientation of 'Roman law was towards the recovery of that which had been given and not towards restoring the balance of enrichment remaining with the enrichment debtor', but points out that a discrepancy developed in the substantive law, 'because the loss of a *species* was considered a good defence in an enrichment action, but not the loss of a *quantitas*, of a class'.<sup>138</sup> Although some of the medieval jurists apparently realised the logical fallacy of allowing loss of enrichment to be pleaded where a slave was killed by accident, but not where the mice ate a sack of

<sup>131</sup> *Summa Theologiae* II-II, Quaest. LXII, art.6. (1974 G. Walsh Translation).

<sup>132</sup> *Ibid.*

<sup>133</sup> *De Iure Belli ac Pacis, Libro tres* (1646), II, X, 2.1 (1909 edition by P.C. Molhuysen).

<sup>134</sup> *De Jure Naturae ac Gentium Libri Octo* (1688), IV, XIII, 6. (1909 edition by P.C. Molhuysen).

<sup>135</sup> J. Gordley in D. Johnston & R. Zimmermann (ed.) *Unjustified Enrichment: Key Issues* (2002) 229.

<sup>136</sup> *Ibid.* 229.

<sup>137</sup> D. P. Visser 1992 *Acta Juridica* 175; D. P. Visser, *Unjustified Enrichment* (2008) 703ff. Observation: Unless otherwise indicated, references and translations in this 'mini-section' (the history of change of position in civil-law systems referent to Visser's view) are as they appear in both Visser's publications cited in this note.

<sup>138</sup> D. P. Visser 1992 *Acta Juridica* 175, 180-186.

corn, they nevertheless never summonsed the intellectual courage to develop this understanding into a rational solution. It was only with the Pandectists, argues Visser following Flume, that it became generally to be accepted that loss of enrichment could be pleaded both in the case of a *species* and of *quantitas*.<sup>139</sup>

Visser arrived at such a conclusion after a detailed examination and interpretation of selected passages of the *Corpus Iuris Civilis* (specifically in the Digest) in the European *ius commune* culminating with Flume's<sup>140</sup> analysis of D 12.6.26.12.<sup>141</sup> From the analysis of D 12.6.26.12, among other texts, Flume had concluded that the 'loss of enrichment could ward off the *condictio* in all cases'. The Digest's passage states the following:

[H]e also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum [*'modico'*] in which case you certainly need only give back what you have left from the price [*'quod ex pretio habes'*]; or again, if I have made the slave more valuable by expenditure upon him, must not this too be valued?'.<sup>142</sup>

The gist of the matter, according to Visser, is what is meant by '*quod ex pretio habes*' for some translate it as meaning 'what you have left from the price',<sup>143</sup> while others as meaning 'what you have received as price'.<sup>144</sup> Noting that both translations are

<sup>139</sup> Ibid. 186.

<sup>140</sup> W. Flume 'Der Wegfall der Bereicherung in der Entwicklung vom römischen zum geltenden Recht' in *Festschrift für Hans Niedermeyer* (1953) 103ff as cited respectively in D. P. Visser 1992 *Acta Juridica* 175, and *Unjustified Enrichment* (2008) 706.

<sup>141</sup> '*...et interdum licet aliud praestamus, inquit, aliud condicimus: ut puta fundum indebitum dedi et fructus condicto: vel hominem indebitum, et hunc sine fraude modico distraxisti, nempe hoc solum refundere debes, quod ex pretio habes; vel meis sumptibus pretiosorem hominem feci, nonne aestimari haec debent?* [...he also points out that it does happen on occasion that we can bring a *condictio* for something different from what we handed over. For instance, I give land not owed and bring a *condictio* for its fruits; or I give a slave not owed, and you sell him honestly for a small sum [*'modico'*] in which case you certainly need only give back what you have left from the price [*'quod ex pretio habes'*]; or again, if I have made a slave more valuable by expenditure upon him, must not this too be valued?]' (Visser's translation at D. P. Visser 1992 *Acta Juridica* 175, and *Unjustified Enrichment* (2008) 706).

<sup>142</sup> D. P. Visser 1992 *Acta Juridica* 175, and D. P. Visser, *Unjustified Enrichment* (2008) 706.

<sup>143</sup> Cf. Kruger, Mommsen & Watson edition of the *Corpus Iuris Civilis* (1985) and R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civil Tradition* (1990) 899.

<sup>144</sup> W. Flume, 'Der Wegfall der Bereicherung in der Entwicklung vom Römischen zum geltenden Recht' in *Festschrift für Hans Niedermeyer* (1953) 103, 104-6.

grammatically possible, Visser argues that the true meaning of those words could only be arrived at by analysing the full context in which they are used coupled with evidence elsewhere in the Digest. Hence, a reading of D 12.6.65.5-8 and the interpretation given to it by certain glossators,<sup>145</sup> and Commentators,<sup>146</sup> as well as by some Roman-Dutch jurists<sup>147</sup> and some German members of the *ius modernus pandectarum*,<sup>148</sup> and after reconciling some differences between glossators and commentators, led Visser to conclude that there was a degree of consensus in the *ius commune* that ‘*quod ex pretio habes*’ had to be read as meaning ‘that which was received as price’.<sup>149</sup>

This meant that the position in the *ius commune* (until the time of the Pandectists) was as it was in Roman law, namely:

‘If you lost a *species* you need not restore it, because loss of a *species* can be pleaded. However, if you have received money in the place of the *species*, you had to restore the money that you received – whether you still have it or not – because money is a *genus* and loss of a *genus* cannot be pleaded’.<sup>150</sup>

Given that the loss of *species* until then could be pleaded, as a defence, but not the loss of a *genus*<sup>151</sup> and the law still considered the calculation of exactly what had to be restored where a *species* had been lost, as being firmly based on the defendant’s surviving enrichment, it follows that ‘if the price received from the *res* was lost, the enrichment-debtor would remain liable, because money is a fungible, a *genus*’.<sup>152</sup> Furthermore, Visser

<sup>145</sup> E.g., the Acurian gloss ‘*Non Tenebris*’ to D 12.6.65.8; The gloss ‘*Solutio*’ to D 12.6.65.6; The gloss ‘*Habes*’ to D 12.6.26.12; the Canon law gloss ‘*Ad pretium*’ to D 12.6.65.8.

<sup>146</sup> Bartolus *Opera Omnia* (Venetiis 1596) ad D 12.6.7; Jason de Mayo, *In Secundum Digesti Veteris Partem Commentaria* (Venetiis 16 29) ad D 12.6.7.

<sup>147</sup> Hugo Grotius, *Inleidinge...* (1952 Edition by F. Dovring, H.F.W.D. Fischer & E. M. Meijers); D.G. van der Keessel, *Praelectiones iuris ad Hugonis Grotii Introductionem at Iurisprudentiam Hollandicam* (1738-1816); W Pauw *Observationes Tumultuariarum Novae* (1712-1787).

<sup>148</sup> WA Lauterbach, *Collegii Theoretico-Practici* (Tubingen 1726) 12.6.29; A Claudius, *De Condictione Indebiti Commentarius* (Francofurti 1605) Ch.7); and CF Glück, *Ausführliche Erläuterung der Pandekten* (1798-1896) vol d ad D.12.6 (§835); A Faber, *Rationalia ad Pandectas* (Genevae 1626-1631) ad D 12.6.7 and D 12.6.65.6.

<sup>149</sup> D. P. Visser 1992 *Acta Juridica* 181-183.

<sup>150</sup> D. P. Visser, *Unjustified Enrichment* (2008) 704 and 714.

<sup>151</sup> Visser cites here a 1745 Dutch case reported by W Pauw in *Observationes Tumultuariarum Novae* (eds H.F. W.D. Fischer et al) vol. 1 (1964) 103 (case no. 148)).

<sup>152</sup> Note, however, that Visser contrasts Bartolus’ comments ‘*Sed quando quantitas solvitur: tunc indistincte dicitur qui [esse] locupletior in eo quod recipit. Quantitas enim perire non potest*’ = [but when a



explains the reason why the price, and not the true value, of a species which had been disposed of, must be restored. That is so because it represents the defendant's remaining enrichment.

#### 1.2.1.1. *The Current Civil-Law Approach to Change of Position.*

The defence of change of position/loss of enrichment is generally held to be available where the loss suffered by the defendant is causally connected to his enrichment. *Mala fide* defendants are generally excluded from the defence. Where the defendant has incurred expenses for the up-keep or improvement of the enrichment object, these expenses can be deducted under the change of position defence to the extent that such expenses cannot be deducted from secondary sources.<sup>153</sup> For example, in German law where the defence is prominent, the cardinal principle of enrichment law is that 'the recipient must under no circumstance end up worse off than before the enrichment'.<sup>154</sup>

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quantity is paid, then it is generally said that someone is enriched by what he has received. For a quantity cannot perish] with Jason de Mayno's response to this passage '*Considera si posset dici quod in frumento [D 12.6.65.6] loquitur quando frumentum consumptum fuit in usum familiae, quo casu est locupletior in pretio, quod necesse habuisset expendere, immo ad pretium tenetur. Hic quantitas illius generalis non erat tali modo consumpta... Sed cave in ultimo membro in quantum Bartolus tenet quod si soluta est pecunie quantitas per errorem indistincte tantundem repetitur, qua quantitas perire non potest, idem vult glossa in l. indebiti § si nummi [D 12.6.15.1] in gl.2 infra eodem [12.6.7]. Sed reprobat per alios omnes ibi, qua petito hereditatis, sicut conditio indebiti solum competit ad id in quo quis est locupletior, l. sed et si l. consuluit ff. De pet. Her. [D 5.3.25] et tamen si pecunia sit consumpta non repetitur l. utrum ff. De pet. Her. [d 5.3.23], ergo idem in condicione indebiti'* = [Consider if it could be said that D 12.6.65.5 is speaking of when corn is consumed in domestic use, in which case he is richer with regard to the price, which of necessity he would have had to pay, and indeed he is liable for the price. Here a quantity of a general commodity was not consumed in that way. But be careful in the second case, where Bartolus holds that if an amount of money has been paid in error, without distinction the same amount is claimed back on the grounds that a quantity cannot perish (and the gloss on that *lex* says the same). But he is contradicted by all the others on the grounds that the *petitio hereditatis*, like the *conditio indebiti*, is available to the extent that someone has been enriched, and therefore in that case if the money has been spent, it is not claimed back, and therefore the same applies to the *conditio indebiti*] (in *Secundum Digesti Veteris partem Commentaria* (Venetiis 1629) ad D 12.6.7). All references and translations in this note are taken directly from the updated version of D. P. Visser publication originally appearing at 1992 *Acta Juridica* 185 and now embodied as part of chapter 12 in D. P. Visser, *Unjustified Enrichment* (2008) 703ff.

<sup>153</sup> BGH 11 January 1980, *NJW* 1980, 1970; B. S. Markesinis, W. Lorenz & G. Dannemann, *The German Law of Obligations* (1997) 764.

<sup>154</sup> R. Zimmermann (2005) 15 *OJLS* 403 at 413. Put in Zimmermann's own words: 'If it is correct that the law of unjustified enrichment is not concerned with the reparation of losses, but with skimming off of unjust gains, we have to focus our attention, in the first place, on the position of the recipient. And if that

This notion permeates both the jurisprudence of the courts<sup>155</sup> and academic writings. The principle is further given full effect by interpreting BGB 818 (I) narrowly, so as to make the defence available even to a defendant who has been grossly negligent in failing to appreciate the fact that he was not entitled to keep the enrichment.

The diverse manifestations of the defence appear generally in the following factual scenarios, though in some jurisdictions some of them will not be entertained: (i) where there is loss of the benefit itself; (ii) where there is an uneconomic use of the benefit; (iii) where there is an expenditure incurred in connection with the benefit;<sup>156</sup> (iv) where there are other expenditures causally connected to the enrichment.

Where, however, mutual performances have been exchanged and the situation creates an interface between the transfer and the application of the BGB § 818 III provisions, German law departs from the application of the disenrichment defence and employs the famous *Saldotheorie*<sup>157</sup> (the difference in value between the performances). In other words, in the case of bilateral contracts which have been avoided *ab initio*, if performances have passed both ways, the measure of the enrichment claim is the difference in value between the performances. Sometimes German law in these cases applies the *Zweikonktionenlehre* or the *Lehre vom faktischen Synallagma* instead of the *Saldotheorie*. The *Zweikonktionenlehre* is often where the contract has been rescinded on

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has induced us to extend his liability so as to cover all benefits retained by him without legal ground, that same consideration may also induce us to limit his liability to situations where there is a benefit, at the time of the *litispendente*, that can be skimmed off. The restitutionary claim, in other words, should reduce the recipient's economic position to the *status quo ante* but it should not force him to suffer a loss'. See equally BGHZ 55, 128, at 134 where it is said: '(a) According to BGB 818 III BGB, the obligation to give up what has been obtained, or to compensate for its value, is excluded to the extent that the recipient is no longer enriched. This provision serves to protect the 'bona fide' enriched party who has used up what has been obtained without legal ground, in reliance on the (continued) existence of a legal ground. Such party should not be obliged to give up or to compensate for value over and above the amount of a true (surviving) enrichment'.

<sup>155</sup> For a collection of German cases on this issue and incidental matters translated into English see B.S. Markesinis, W. Lorenz and G. Dannemann, *The German Law of Obligations*, Vol. I (1997) 770-816 (Gerhard Dannemann's translations).

<sup>156</sup> See for example Case No. 131 BGHZ 118, 383 (Bundesgerichtshof 12<sup>th</sup> Civil Senate 17 June 1992 (English Version by Gerhard Dannemann in B. Markesinis, W. Lorenz & G. Dannemann, *The German Law of Obligations* (1997) 777-778).

<sup>157</sup> Reference is made elsewhere in this work about the other competing theories to the *Saldotheorie*, namely the *Zweikonktionenlehre* (according to this theory 'each party to a synallagmatic contract has his own claim against the other party.) and the *Lehre vom faktischen Synallagma*'. See below at 3.6.2 (Failed contracts in South Africa).

ground of deceit, or is void for a minor's lack of capacity to contract.<sup>158</sup> Because the provisions of § 818 III BGB limit the duty to make restitution in *species* or in money to the surviving enrichment, the 'something' which has to be returned under the general provision in § 812 BGB is generally considered that it 'cannot be any single value which has passed from the claimant to the defendant, but only the totality of what has passed taking account of the values which were given in exchange and the encumbrances resting on what has been received'.<sup>159</sup> In essence in these cases the loss of enrichment defence is not applied.

### 1.2.2. Common-Law Systems.

The history of change of position in common law jurisdictions is closely associated with the development of *Indebitatus assumpsit*. One of the landmark cases in that development is *Moses v MacFarlane* in which Lord Mansfield among other things, said the following:

'This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which *ex aequo et bono*, the defendant ought to refund; it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty ... In one word, the gist of this action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund the money*' (emphasis added).<sup>160</sup>

<sup>158</sup> Example that fall on the application of the *Zweikonditionenlehre* would be where A is deceived into buying a car with serious safety defects, and these very defects cause an accident in which the car is destroyed. In this case, it is argued, A can rely on change of position and still claim back the purchase price. (See generally B. Markesinis, W. Lorenz & G. Dannemann, *The German Law of Obligations* (1997) 765).

<sup>159</sup> Staudinger/Lorenz § 818 No. 50 (as cited in T. Krebs, in E.J.H. Schrage (Ed) *Unjust Enrichment* (2001) 311).

<sup>160</sup> *Moses v MacFarlane* 2 Burr 1005, 1012 (1760). In the common-law world Lord Mansfield raises mixed-feelings. He is regarded by some writers as a pioneer while by others with dissatisfaction for obscuring the action for money had and received with his liberality of subjecting this area of the law to 'good conscience' and morality of 'natural law'. H. Cohen in (1932) *Harvard L.R.* 1333, 1338 referring to the extracts of Lord Mansfield in *Moses v. MacFarlane* below said: 'Perhaps an impetus less diffuse would have resulted in formulations of more precise categories of defences in place of this generous outpouring of spirit. The question posed is whether, despite this unprincipled, yet still articulate, moral urge there is not today some ground for the assertion that defences in quasi-contracts are governed by law instead of by 'natural justice'. See also P. B. H. Birks (1984) *Current Legal Problems* 1, 5 referring to the 'dark side' of

From that proposition, as a matter of logical conclusion, Lord Mansfield adds:

‘It is the most favourable way in which one can be sued: he can be liable no further than the money he has received; and against that, may go into every equitable defence, upon the general issue; he may claim every equitable allowance; etc; in short, he may defend himself of everything which shows that the plaintiff, *ex aequo et bono*, is not entitled to the whole of his demand, or to any part of it’.<sup>161</sup>

These texts clearly manifest that ‘unjust enrichment’ is rooted in equitable principles in the common-law world, and as such if recovery by the plaintiff is a matter of equity, and the plaintiff may always recover whenever it is equitable to do so, it also follows that the defendant must prevail when the equities are in his favour. Put differently, where the equities are equal, the loss lies where it falls. Early interpretations of the right to recover money paid under mistake, especially in American law<sup>162</sup> were to the effect that if the right to recover money paid under mistake was held to be measured by equitable principles, equitable defences would also adhere to it. Given the fact that change-of-position was a defence in equity, it also followed that change-of-position was a defence in quasi-contracts.<sup>163</sup> In a detailed analysis of the defence, George Costigan,<sup>164</sup> back in

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*Moses v. MacFerlan* with its ‘three unrelated forces which came together to deform an important area of the common-law’.

<sup>161</sup> *Moses v MacFerlan* 2 Burr 1005, 1012 (1760).

<sup>162</sup> G. Costigan (1907) 20 *Harvard. LR.* 205; H. Cohen (1932) *Harvard LR* 1333, 1344 n 33.

<sup>163</sup> H. Cohen however disagreed with these holdings. As early as 1932 he expressed the view that if change of position in equity were simply an aspect of the wider attitude that any form of hardship was a cause for the denial of equitable relief, it would contradict equity itself, because a result which upheld the defence but left the suitor without remedy in any court was very unusual in equity; the normal result and the general intention was to relegate the suitor to an action at law where he could find some solace, adequate or not. He adds further that even if one assumed that the rights in quasi-contract were equitable, one could still reason that the defence of change of position did not necessarily attach. Hence, if validity had to be accorded to the defence, it did not legitimately follow from a confused analogy to equitable rights and remedies. But Cohen recognised that it did occasionally happen that the denial of equitable relief entailed denial of any relief. In his view however, such outcome only occurred where equity did not follow the law, but stood ready to grant an extraordinary remedy (H. Cohen (1932) *Harvard. LR* 1333, 1345 n. 35). Contrast however his predecessor – Costigan – who says: ‘That the subject of change of position as a defence to the action for money had and received is confused, seems at first sight strange. The obligation to repay money paid to one by mistake of a material fact is quasi-contractual, since it exists regardless of the consent and yet may be enforced by a contract action, and since it is imposed by law because *ex aequo et bono* the defendant ought to pay the money. Though the money is recoverable in an action at law, because common law judges saw fit to allow a remedy at law instead of requiring the plaintiff to bring a suit in equity, the right is essentially equitable’ (1906) 20 *Harvard. LR* 205). These discussions are today obsolete in American law, as by legislation, American law eliminated the distinction between action in equity and action at law. Today it holds that all non-criminal actions are to be called ‘civil action’ (see Laycok (1989) 67 *Texas LR* 1277).

1906 discussing the various circumstances in which the defence arose, especially where neither party was negligent, held that ‘the principle which forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself at the expense of an innocent and blameless defendant’. In a modernised philosophical language, one would say with Lionel Smith<sup>165</sup> that ‘the plaintiff’s claim being based on the Kantian right, i.e, on his status as a self-determining agent, he must respect equally the defendant’s Kantian right’ – i.e, recognise the autonomy of the defendant as self-determining agent. That is so because in any circumstances in which the defendant, before he has any reason to suspect he is liable to a claim in unjust enrichment, he cannot be faulted for behaving as a self-determining agent, including through consuming that which he reasonably believes to be his own wealth. Therefore, in a common law system, the defence of change of position is primarily aimed at protecting the security of the receipt. That notion also accords with the liberal and individualistic approaches of the common-law towards restitution in general and its ordinary system of risk allocation. The defence is concerned with protecting the security of receipt because it is reckoned that where the defendant believes in good faith that he is the owner, ‘no moral issue’ is involved, because ownership is the ultimate right ‘in property’. Where such defendant has changed his position, to deny him a defence would be tantamount to subjecting him to liability without fault and without corresponding benefit. Furthermore, if it is also assumed that the plaintiff is equally without fault, then, the only question that indeed arises in such circumstances is which of the two innocent persons shall bear the loss that has been incurred.<sup>166</sup> The equities being then equal, as already mentioned in the introduction to this chapter, common law in general sees no reason why the plaintiff’s loss should be shifted to the defendant who neither made a mistake nor reaped a benefit. Therefore, the logical conclusion is that in such cases the loss should indeed lie where it now falls.<sup>167</sup>

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<sup>164</sup> (1906) 20 *Harvard LR* 205, 214.

<sup>165</sup> L. D. Smith (2001) 79 *Texas LR* 2115, 2148-49.

<sup>166</sup> The notion of fault is more prevalent in some United States jurisdictions than in the Commonwealth jurisdictions.

<sup>167</sup> Further historical developments of the defence and prominent cases, especially in American law, are given in chapter two below. The modern application of the defence is also discussed in chapter two.

### 1.3. Conclusion.

The common-law and civil law of unjustified enrichment developed along different lines, especially from the sixteenth Century. Both, however, had been influenced by the social thought of their times and particularly by the theological and natural law schools prevalent at the time. The notions of justice that prevailed at any given time and the social context in which they operated cannot be dissociated from the legal reasoning of that period. For English law, during the time where justice could not be obtained from the common-law courts due to the rigidity of the rules applied there, a claimant could have recourse to the courts of equity for a remedy, and courts of equity basically applied 'natural law' principles. We have seen that the very notion that no one should be enriched at the expense of another without justification, was a notion founded in equity and the defences that could be advanced by a defendant were also seen as equitable, although with some reservation in many instances. The extension of the Roman remedies in civil-law jurisdictions has some equitable elements as well, and when a general principle against unjustified enrichment was finally formulated, it became inevitable that its application should also be complemented with adequate defences to protect the interest of defendants. The most important defence has generally been accepted to be change of position or loss of enrichment. Although some jurisdictions do not directly have such a defence, or give it that name, they do have subtle mechanisms that in effect amount to applying a defence of change of position.

Given that whenever there is a claim in unjustified enrichment a tension will inevitably arise between the demand for restitution of what was acquired without legal ground and the general interest of the receiver to protect his own assets, those jurisdictions that recognised a general principle against unjustified enrichment realised early on that the easier it is made to claim restitution, the more vulnerable members of society become in securing their own wealth and investments. Therefore to protect both interests, any generally liberalised system of unjustified enrichment had to afford honest and *bona fide* receivers a general tool to resist such claims whenever a receiver, inter alia, disposed of a wealth that appeared to be his own as a self-determining agent.

## CHAPTER II

### THE SCOPE OF CHANGE OF POSITION IN THE CONTEXT OF OTHER DEFENCES IN THE LAW OF ENRICHMENT.

#### 2.1. *Introduction:*

Depending on the facts of the case, an enrichment claim can be resisted in *toto* or in part and in different ways. The manner in which a claim is resisted is commonly called a defence, though the cases may not necessarily use this exact term. Defences, in general, may be of various kinds. They may be positive or they may be negative; they may be total or partial; they may be permanent or temporary; they may go to the root of the claim itself (thereby denying the claim's validity) or they may relate to extrinsic facts giving rise to the claim (thereby denying its effectiveness). They may be general, or they may be peculiar to certain types of claims or specific to a certain field of law or to a certain subset factual scenarios. Regardless of the nature of the defences, all of them have one thing in common, namely to either exonerate fully the defendant from liability or to reduce his or her liability. The recognition of certain enrichment defences is dependent on how the claim itself is perceived in a particular legal system, while others are neutral to any formulation adopted. There is also no exhaustive list of defences and their nomenclature varies from jurisdiction to jurisdiction.

The purpose of this chapter is to address particularly the defence of change of position (loss of enrichment) and its relationship to the other typical defences in unjustified enrichment. It explores what exactly amounts to change of position in four jurisdictions (England, the United States of America, Canada and South Africa) as well as what other defences in unjustified enrichment have to say.

Brazil is not discussed in this chapter and in the next chapter. It will become clear why it is dealt with separately. For the time being it suffices to mention that change of position as a defence *prima facie* is not directly provided for in the Brazilian enrichment law.

Illegality and passing on are equally not discussed in this chapter either; they are simply mentioned. They are the subject of separate chapters for different reasons to be explained in the respective chapters. Some of the listed defences may not be discussed in certain jurisdictions if in the context they offered little impact on change of position.

The analysis of the defences in each of the four jurisdictions is preceded by a general introduction of the defences in that particular jurisdiction. The introduction gives the full context of each defence in that jurisdiction and deals with incidental issues arising thereto.

## 2.2. *Descriptive Definitions of some Concepts used in this Chapter.*

*Bona Fide Purchaser* for value (bfp): - This defence is raised by a person who had no reasonable basis to suspect that the seller did not have good title and paid for what he acquired (i.e. for value) in good faith. It mostly arises if one person seeks to assert a right to a thing against a third party who has (or has acquired) legal title.

*Change of position* (or loss of enrichment) is the theme of this thesis and is defined at the beginning of the thesis.<sup>168</sup>

*Election* as a defence (specially found in Canadian law) means that an earlier case provided the plaintiff with a choice of remedies, and he choose what at the time he thought to be the appropriate remedy for his claim, and in a later case his earlier election might disentitle him enforcing the other right. This defence often appears alongside with that of *res judicata*.

<sup>168</sup> See pages. 1-2 above. The definition is repeated here for convenience sake: change of position is the defence in terms of which the defendant acknowledges the 'validity' of the plaintiff's claim, but nevertheless pleads to be exonerated from the liability to restore in full or in part the said enrichment due to changed circumstances that would render it 'inequitable' for him to account to the plaintiff.



*Estoppel* is ordinarily a defence raised by someone to whom a representation was made, and who has altered his position detrimentally in reliance on that representation. The defence entails that the person who has made the representation is denied the right to assert that the representation is not true (so he is stopped).

In law *Incapacity* is a privation arising from nature, or law, or from both, which deprives a person of a quality legally to do, give, transmit or receive something. It arises from nature such as in cases of youth, mental incompetence or frailty; it arises in law such as in cases of prodigals or convicted felons.

*Illegality* is a defence in term of which one party asserts that the obligation in issue (or right at stake) should not be enforced or entertained by the courts due the fact the matter is tainted with unlawfulness or for being contrary to public policy and/or good morals.

*Laches* is a defence (found mostly in American law) that is raised due to the plaintiff's length of delay in bringing the suit that could be inequitable where it results in detriment to the defendant, although in extreme cases even the showing of prejudice can be ignored.

*Limitation* is roughly the American term corresponding to 'prescription' in the other jurisdictions under discussion in this work.

*Ministerial Receipt* (or Payment over) is the English law term for 'agency'. It is a defence raised by an agent acting for a principal against an unjustified enrichment claim brought against him by a third party, where the agent has paid over money to his principal because it is thought the appropriate defendant is the principal.

*Passing on* is a defence in term of which one party resists another's claim on the ground that the claimant has already recouped his losses by transferring to a third party (usually customers) all or part of the burden for which he now seeks to recover from the defendant.

*Prescription* is a defence in term of which the right to claim performance of an action (or the prerogative to enforce a legal right) is lost due to an inaction over a specified period of time.

*Res judicata* is a defence in term of which the defendant pleads that the matter at issue has already been adjudicated by a competent court with a final decision and should not be reopened for the interest of justice.

*Waiver* is a voluntary and intentional relinquishment, surrender, or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which, except for such a waiver, the party would have enjoyed.

**NB.** ‘Waiver’ differs from ‘laches’ primarily in that ‘laches’ requires a showing of prejudice to the party claiming it, whereas ‘waiver’ does not.

## 2.3. Defences to Unjust Enrichment Claims in English Law.

### 2.3.1. *Introductory Remarks.*

A claimant who has established a claim according to the requisites that the defendant must have been unjustly enriched at the claimant’s expense due to an ‘unjust factor’ (*or sine causa*),<sup>169</sup> may still be denied a restitutionary (unjust enrichment) remedy because of the existence of an appropriate defence. There are various ways a defendant can resist a claim based on unjustified enrichment, but all defences can be grouped into affirmative (positive) defences and negative defences. The negative defences simply deny the validity of the claim itself, while the affirmative defences invite an inquiry into the

<sup>169</sup> Although the *sine causa* approach is not officially acknowledged in English law, more recent jurisprudence is increasingly leaning towards that notion in the law of unjust enrichment. As explained in the nomenclature note at the beginning of the thesis, unjust and unjustified enrichment do not square completely, and English law in particular uses unjust enrichment instead of unjustified enrichment. But these terminological differences are not insisted upon in this work and I will uniformly use unjustified enrichment for English law as well.

balance of equities between the parties. In this second category, the defendant concedes that he received a benefit of a kind which the plaintiff might ordinarily recover in unjustified enrichment, but he pleads that circumstances make it inequitable to hold him liable. Put differently, these defences are a sort of plea of avoidance, i.e, confess and avoid. Some authors prefer to classify the defences according to the element of the enrichment claim to which each defence is related, viz, to ask, first, whether the defendant is actually enriched, or, secondly, if he is so enriched, whether such enrichment was a the claimant's expense, or, thirdly, whether such enrichment is unjustified.<sup>170</sup> Whatever classificatory approach is used, the following are generally the defences against an unjustified enrichment claim: change-of-position, estoppel, counter-restitution, limitation (*prescription*), dispute resolved (*res judicata*), incapacity, illegality, *bona fide* purchase from a third party, ministerial receipt, and passing on.<sup>171</sup>

According to the last mentioned classificatory scheme, change-of-position, and probably counter-restitution go the question of the defendant's enrichment; passing on goes to the question whether the enrichment was at the claimant's expense;<sup>172</sup> and limitation, dispute resolved (*res judicata*), incapacity, illegality and *bona fide* purchase all go to the enquiry of the unjustifiedness of the enrichment.<sup>173</sup>

In a detailed analysis of the defences Birks opines further that incapacity and illegality could also be considered together under the heading of stultification, because all of them, in one way or another, defend the principle that if the plaintiff's claim were to be allowed the law would be made ridiculous, indefensibly enabling with the right hand what it endeavours to prevent with the left.<sup>174</sup> It is to be observed that these two defences also occur in contract, but there they arise in very distinct contexts, while in unjustified

<sup>170</sup> P. B. H. Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (2002) 123. Note, however, that often English writers ask whether such enrichment is 'unjust' instead of 'unjustified'.

<sup>171</sup> Some new cases are trying to amplify the list, although the one just cited is not exhaustive. But new suggestion such as the one found in *CIR v Deutsch Morgan Grenfell Group Plc* [2005] EWCA Civ. 78, [2006] 2 WLR 103 par. 93 and par. 113 that the law should now consider defences such as 'settled understanding of the law'; 'defence of compromise' and 'settlement of an honest claim' are not finding favour in the courts.

<sup>172</sup> P. B. H. Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (2002) 145.

<sup>173</sup> Ibid 145.

<sup>174</sup> Ibid 124.

enrichment they seem to work in the same way, that is to say, they are recognised only when, as just mentioned, allowing the action in unjustified enrichment would make nonsense of the law's rejection of some other claim arising on the same facts.<sup>175</sup> This is to a certain extent akin to the civilian doctrine of subsidiarity briefly discussed in chapter 4 below and also mentioned elsewhere. Obviously, not all cases of illegality and incapacity will lead to stultification, because stultification in this context implies indefensible contradiction. The law is stultified if it takes contradictory positions and can give no convincing reasons for doing so. Where the law is able to give good reasons for the 'apparent' conflicting positions, the contradiction is deemed not to be real. In such cases the defence of stultification will inevitably be defeated.<sup>176</sup> In a later chapter I will return briefly to the law relating to illegality and we shall see the nuances of the '*ex turpi causa non oritur actio*' in a wider context.

Meanwhile, in the analysis of these defences in the context of English law one should still be mindful that what often counts as a defence rests on common practice or understanding rather than clear-cut principle.<sup>177</sup> It is in this regard that we find, for example, estoppel being both classified as a cause of action, though mostly in contractual terms, and as a defence.<sup>178</sup> In the same vein, as Burrows demonstrates, it is also theoretically possible in common law, albeit contrary to convention, to treat as a defence the traditional need for failure of consideration to be total: here one could say that a claimant who proves that he made a payment for a failed consideration establishes a *prima facie* case for restitution to which the defence is that the failure of consideration was partial.<sup>179</sup> So here we see that the failure of consideration is both a 'cause of action' as well as a defence. The same is also true of the illegality defence. It is sometimes said that illegality is a cause of action, but it is not doubted that it is a defence as well to claims in unjustified enrichment. For example, Goff and Jones, while acknowledging that illegality operates as a defence, assert nonetheless that 'there are situations where a

<sup>175</sup> Ibid 124-125.

<sup>176</sup> Ibid 125.

<sup>177</sup> A. Barrows, *The Law of Restitution*, (2002) 509.

<sup>178</sup> See for example how Americans put it: 'when pleaded as a defence, estoppel properly may be set in the answer; when it is a part of the cause of action, generally it should be set forth in the complaint or petition, or reply' (28 *American Jurisprudence* 2d § 168.

<sup>179</sup> A. Burrows, *The Law of Restitution* (2002) 509.

plaintiff is able to rely on illegality itself as a ground to support his restitutionary claim'.<sup>180</sup> It is sometimes thought this to be an anomaly in the common-law, but the issue is of no effect for our purpose.<sup>181</sup>

As in recent years the grounds of restitution in English law have been expanded, in part due to the acceptance of the 'but for' causation test for mistakes of fact and by the abolition of the mistake of law bar,<sup>182</sup> coupled with an increasing willingness to evade the requirement of total failure of consideration. The corollary of these developments has been an increased emphasis on the defences to ensure sufficient security of the receipt and to avoid there being excessive restitution. Indeed, with this new approach, rather than the courts placing arbitrary restrictions on liability, the scope of unjustified enrichment has now become more openly and perhaps more satisfactorily controlled by the defences, especially the defence of change of position. This is so because English law realised that 'denial of the existence of the cause of action is seldom, if ever, the appropriate response to fear of its abuse', as Lord Nicholls<sup>183</sup> put it. Let us now consider change of position itself and how it relates to the various other defences.

<sup>180</sup> R. Goff & G. Jones (5<sup>th</sup> ed. 1998) 607. In support of such position Goff & Jones cited cases going as back as 1760 in *Smith v Bromley* (1760) 2 Doug 696n and until very recently, they argue that that is still the position (see at p. 613 where they cite more cases). A. Burrows, *The Law of Restitution* (1993) chap. 11 and 15 once supported the same view by dedicating chapter 11 to Illegality as Ground of Action and another –chapter 15 for Defences. But it appears he has partially reversed himself in the 2002 edition and he treats now illegality as defence only in chapter 15, item 7, although in chapter 12 he still maintains it as a ground of restitution.

<sup>181</sup> However, this apparent anomaly in the common-law seems to have been mitigated in recent times as several English authors have now concluded that the distinction between prima facie liability and defences does have practical significance in that the burden of proof switches to the defendant once prima facie liability is established. See for example W. Swadling 'The Role of Illegality in The English Law of Unjust Enrichment' (2000) dealing with such anomaly in the treatment of the illegality defence. The Article is available at [www.ouclf.org](http://www.ouclf.org).

<sup>182</sup> Mistake of law bar was finally abolished from English law in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349. The same happened in many other countries: In South Africa, as I already mentioned elsewhere in chapter 2, mistake of law rule was judicially abrogated in 1992 in *Willis Faber Einthoven (Pty) Ltd v Receiver of Revenue* (1992) 4 SA 202 (A); In Canada it has also been removed in 1989 in *Air Canada v British Columbia* (1989) 59 DLR (4th) 161; in Scotland it was abrogated judicially in *Morgan Guarantee Trust Co of New York v Lothian Regional council* 1995 SLT 299; and in New Zealand it was removed by legislation in ss 94A-94B of the New Zealand Judicature Amendment Act 1958.

<sup>183</sup> *Phelps v Hellington London Borough Council* [2000] 3 WLR 776 at 792.

### 2.3.2. *Change-of-Position Defence in English Law.*

As stated in the introductory chapter to this thesis, change-of-position as a defence to an unjustified enrichment claim arises where, on the reasonably held belief the defendant would not be called upon to restore the enrichment, he has incurred a loss or expenditure that he would not otherwise have incurred and that has reduced his total wealth.<sup>184</sup> Put differently, change-of-position is a defence in line with the premise propounded by Keener more than a century ago, namely that ‘the principle that forbids the defendant enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent [and blameless] defendant’.<sup>185</sup> With some nuanced variations in form and substance, this has been the principle accepted (or rather re-accepted) in English law in the *Lipkin Gorman* case in 1991, thus recognising the defence of change of position in England. Thus Lord Goff said in that case:

‘[W]here an innocent defendant’s position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to pay outweighs the injustice of denying the plaintiff restitution’ (...). Consequently, ‘*bona fide* change-of-position should of itself be a good defence in cases such as these’.<sup>186</sup>

Although is still subject to debate and disagreement, it is now widely argued (and often accepted) that the defence of change of position is indeed a general defence to all unjust enrichment claims, for it has a bearing both on personal rights (obligations) and on rights *in rem* (property rights).<sup>187</sup> It is considered as a defence to rights *in personam* (obligations) because a claim to an unjust enrichment is often concerned with ‘abstract enrichment’, i.e, the units of value added to the fund which is the defendant’s entire wealth.<sup>188</sup> As we shall see in greater detail at a later stage, in this sense its effect on those who are qualified to plead it is to reduce their liability to restore the units of abstract

<sup>184</sup> R. Grantham & C. Rickett, *Restitution & Enrichment in New Zealand* (2000) 345.

<sup>185</sup> W. A. Keener, *A Treatise on the Law of Quasi-Contract* (1893) 62-3.

<sup>186</sup> *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548, 579.

<sup>187</sup> P. B. H. Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (2002) 134-135.

<sup>188</sup> *Ibid* 134.

enrichment surviving at the time when they are notified of the claim.<sup>189</sup> But it is also a defence to a right *in rem* (proprietary right), where the claim to an unjustified enrichment is focused on a special thing which is the vehicle of the enrichment.<sup>190</sup>

Subdividing the change-of-position defence into a non-disenrichment arm and disenrichment arm, Peter Birks argues that the disenrichment arm of such defence can in principle do some or all the works done by some or all other defences.<sup>191</sup>

But there is no unanimity in common law legal systems, and in English law in particular, as to the definitive characterization of the defence. While Burrows and Birks, and many others who hold similar views, seem to support one position, namely maintaining that restitutionary claims are based on a unifying concept of unjust enrichment at the plaintiff's expense (thus explaining the rationale of the defence in terms of the concept of benefit<sup>192</sup> or enrichment),<sup>193</sup> Jackman,<sup>194</sup> Hedley<sup>195</sup> and others are critical of this approach and contend that the problem with those (the Burrows-Birksian) explanations is that they treat the defence as a mechanical exercise of giving the defendant credit for expenses referable to the initial receipt. Jackman, in particular, is a vocal challenger of that position. Referring to the *Lipkin Gorman* case, where the defence was fully introduced in English law, Jackman states that

<sup>189</sup> P. Key (1995) 58 *MLR* 505-522; P. B. H. Birks, *The Foundations of Unjust Enrichment: Six Centennial Lectures* (2002) 134.

<sup>190</sup> P. B. H. Birks, *The Foundations* 134.

<sup>191</sup> In the 2005 edition of his book, Birks is disinclined to see a global generalization of change of position and recognises more and more the functions and place of the other defences.

<sup>192</sup> For Burrows, the essence of the defence lies largely on an underlying principle and in its analysis one must naturally ask: 'has the defendant's unjust enrichment been cancelled out by his subsequent loss of the benefit?' (A Burrows, *Restitution* (1993) 423 and in 2002 edition 510-529).

<sup>193</sup> In the same vein Birks thinks, as already mentioned, that the defence is 'enrichment-related', rather than 'unjust-related', in that a change of position is an outflow of wealth which ought to be set against the enrichment received so as to reduce the plaintiff's recovery'. (*The Foundations of Unjust Enrichment: Six Centennial Lectures* 128-136).

<sup>194</sup> I.M. Jackman, *The Varieties of Restitution* (1998).

<sup>195</sup> *Restitution: Its Division and Ordering* (2001).

‘The emphasis on the defendant’s innocence (in that case) indicates that the defence is concerned as much with the moral quality of the defendant’s conduct as it is with the question whether the defendant is materially better off as a result of the transaction’.<sup>196</sup>

While the Burrows-Birksian approach to the defence would only make it available if the defendant has acted in good faith, ignorant of the facts which give rise to the plaintiff’s restitutionary claim, Jackman’s approach sees it as going beyond those bounds, in that the defence’s complete explanation is that it is based on the ‘unfairness of requiring a defendant to restore the plaintiff to his previous position, in circumstances where the defendant receives money in ignorance of the facts which make that receipt vulnerable to a claim for restitution, and then spends some or all of that money in reliance on the validity of the payment’.<sup>197</sup> On this basis, it is conceivable that the defence’s primary concern is the balancing of rival claims of two innocent parties: the plaintiff who did not intend to make the transaction, and the defendant who receives a windfall without notice of the vitiating circumstances and then spends it.<sup>198</sup> The premise in this argument, it would seem to me, is that where generally the plaintiff’s conduct would lead to an undue net loss to the defendant by reason of a changed position, as will ordinarily be the case where funds are disbursed then, the parties being equally innocent, recovery will indeed be denied.

Jackman’s position apparently does not take into account that the defence of change of position often, although not necessarily, involves a third party and that the defence allows the defendant to resist the claim, in whole or in part, on the basis of some other transaction, usually occurring after<sup>199</sup> the defendant’s enrichment. The defence also presents itself in at least two distinct versions: the reliance version and the disaster version.<sup>200</sup> In the disaster version of the defence, the defendant shows that the wealth received from the plaintiff has been consumed by some disaster, such as where it was deposited in a bank which subsequently went insolvent. This version of the defence is

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<sup>196</sup> I. M. Jackman, *The Varieties of Restitution* (1998) 164.

<sup>197</sup> Ibid. 164.

<sup>198</sup> Ibid. 167.

<sup>199</sup> Anticipatory reliance is dealt with in a separate heading in this thesis (see footnotes 934-941 below).

<sup>200</sup> See generally L. Smith (2001) 97 *Texas LR* 2115, 2148.



available even in the case of a defendant who knew that the wealth must be refunded. On the reliance version of the defence its rationale is that the defendant innocently relied on the receipt of the wealth which he thought belonged to him, and he therefore made expenditures he would not otherwise have made.<sup>201</sup>

In sum, the English defence of change of position emphasises the protection of security of receipt and it is a clear manifestation of the liberal foundations upon which the legal system asserts namely that the interests of individuals are properly protected only if they are all in general free to dispose as they please of whatever wealth appears to be at their disposal. If it were otherwise, so it is argued, freedom itself would be curtailed and each individual would be required to set up contingency insurance to guard against the dangers of double losses, to fire and to a restitutionary plaintiff, as Birks put it.<sup>202</sup> In other words, the change-of-position defence in English law is the counterbalancing device of the potentially unruly general enrichment action.

### 2.3.3. *Estoppel defence in English Law.*

Estoppel in English law is a complex doctrine, with various ramifications. It is generally divided into common law estoppel and equitable estoppel.<sup>203</sup> These two main headings have sub-species that vary considerably and often overlap. The concept is used in various other branches of law such as contract and property law. For this reason it is said that 'this defence, unlike change-of-position, which is not a defence to causes of action other than those based on unjustified enrichment, there is nothing peculiarly restitutionary about estoppel'.<sup>204</sup> If one looks at English case law in the various branches it is clear that any private right,

<sup>201</sup> L.D. Smith (2001) 97 *Texas LR* 2115, 2148-2149.

<sup>202</sup> P. B. H. Birks, 'Change of position...' in M. McInnes (ed.) *Restitution: Developments in Unjust Enrichment* (1996) 62.

<sup>203</sup> Some examples of these sub-species of estoppel are: proprietary estoppel, promissory estoppel, estoppel in pais, etc.

<sup>204</sup> A. Tottenborn, *The Law of Restitution in England and Ireland* 3<sup>rd</sup> Ed. (2002) 279.

‘whatever its origin, may be barred by an express or implied statement that it will not be exercised’, coupled with change-of-position on the faith of it, in circumstances such that it would be inequitable to assert it. Nevertheless, ‘estoppel is commonly relevant in practice in restitutionary claims, in particular where payment by mistake is concerned’.<sup>205</sup>

However, the estoppel that is of interest to the law of unjust enrichment is estoppel by representation.<sup>206</sup> It is nevertheless to be noted from the outset that estoppel in English law is a rule of evidence or a procedural norm and not a substantive rule, and this fact may contribute to certain nuances in the common-law not being easily understandable in civil-law systems. As a procedural ‘defence’, it defeats the plaintiff’s claim *in limine*, that is to say, it prevents the plaintiff from making out his cause of action<sup>207</sup> and for that reason it is never tailored to the defendant’s reliance expenditure.<sup>208</sup> Where the facts suggest that the defendant, having relied to his detriment but without eliminating more than part of his enrichment, should be allowed to shut the plaintiff out of his action altogether, estoppel can indeed do a job that change of position, just discussed, cannot do. Therefore where, for example, a recipient of a sum of money queries it, but he is assured in the clearest possible terms that the payment is in order, and based on such assurance he invests the said sum and loses, say, 70 per cent of the sum received, change of position would reduce his liability by 70 percent, but estoppel, as an absolute defence, will deny the plaintiff altogether any cause of action, because of the plaintiff having represented that the payment was in order, and he will not be allowed to allege inconsistently with that representation that he had been mistaken. With the recognition of change of position as a general defence in English law, the importance of estoppel has diminished, but it still plays a role in appropriate circumstances, for it affords, as we have just seen, the

<sup>205</sup> Ibid 279.

<sup>206</sup> Several commentators and academics are critical of the continued existence of so many divisions on estoppel, and whether it makes any logical sense to have equitable estoppel and common law estoppel. For a brief history of estoppel by conduct in English law and its adaptation from the fifteenth to the eighteenth century see G. Jones (1957) 78 *LQR* 49-53.

<sup>207</sup> See for example *Avon County C v Howlett* [1983] 1 WLR 605.

<sup>208</sup> This position is however resisted by the Australians who have a partial defence of estoppel. For example in *Walton Stores (interstate) Ltd v Maher* (1988) 164 CLR 387 – the High Court of Australia recognised what is termed as the doctrine of equitable estoppel, which was an amalgam of proprietary and promissory estoppel, whereby relief would be awarded only to the extent of the defendant’s detriment.

defendant a better defence because of its all or nothing approach.<sup>209</sup> Hence, the notion of estoppel by representation essentially entails that one party, due to a statement made by him or his manifest conduct preceding an agreement (or certain other state of affairs), may be denied a relief (or claim a relief) that in ordinary course of events he would be entitled to.

The particular kind of representation that is relevant in this context is a statement to the effect that the recipient of an enrichment may regard himself as secure in his receipt.<sup>210</sup> The representation may be express or implied. Where the performance consists of paying a sum of money, the representation may be inherent in the payment itself it may be collateral to it.<sup>211</sup> A representation is considered as being inherent in the payment if it is inferred from the fact of the payment itself in the context in which it is made, while a collateral representation is one which is distinct from the inherent representation and which, if it is implied rather than expressed, is based on facts additional to the bare fact of payment.<sup>212</sup> Where, for example, a payer owes a duty to the payee to pay over the correct money, there is a factual representation inherent in the payment that that is money owed to the defendant. In contrast, most payments do not carry an inherent factual representation that the payee is entitled to the payment and the defendant needs to show a representation collateral to the payment if he is to make out an estoppel.

Once there is representation capable of being relied upon, the other elements of the defence are that the defendant must actually have relied on it and must have done so to his detriment.<sup>213</sup> But reliance also has different nuances, and not any reliance will suffice to defend successfully the case under estoppel. Generally, where the claim is a claim for money, a reliance which is detrimental can in principle appear in three different forms as

<sup>209</sup> See for example A. Burrows, *The Law of Restitution* 2<sup>nd</sup> Edition (2002) 528. However P. Jaffey in *The Nature & Scope of Restitution* (2000) 256 opines that estoppel is only a complete defence in circumstances where there would be available a change of position defence to do justice between the parties. That view also finds some support in Australian law as alluded to elsewhere in this chapter.

<sup>210</sup> P. B. H. Birks, *An Introduction to the Law of Restitution* (1985) 402 and P. Birks *Unjust Enrichment* 2<sup>nd</sup> Ed. (2005) 213-223, 258-260.

<sup>211</sup> A. Burrows, *The Law of Restitution* 2<sup>nd</sup> Edition (2002) 531.

<sup>212</sup> P. B. H. Birks, *An Introduction to the Law of Restitution* (1985) 402.

<sup>213</sup> *Ibid.* 407.

Beaton and Bishop<sup>214</sup> have suggested: 'Conventional reliance', 'out-of-pocket reliance' and 'real reliance'. 'Conventional reliance', according to the authors, requires simply that the defendant must have spent or committed the money in a way which cannot be recouped; 'out-of-pocket reliance' requires that the defendant must have spent or committed the money in a way which cannot be recouped and in a way which he would not otherwise have done; and 'real reliance' brings into account against out-of-pocket reliance the additional benefit that the defendant has derived from spending the money in the way in which he would not otherwise have done.

Of these three forms, usually only the second is taken into account in the application of the estoppel doctrine. That is so because the first form ignores the need for loss to have been caused to the defendant by the representation. In other words, if one would have spent his money in the same way anyway, it can easily be said that one has been saved an expense and therefore cannot be said to have suffered any detriment as a result of the representation. The third form requires an impossible assessment into subjective values. Burrows opines that taking account of subjective values simply cancels out the expenditure on the reasoning that any exchange is worth to the defendant what he paid for it.<sup>215</sup> That being the case, we are left with only the second form of reliance. On its terms it is clear that the law must take account of the 'out-of-pocket reliance' view. (This is the approach that is usually taken on proprietary and promissory estoppel with which, as I said earlier, I am not going to deal with). Therefore, to establish estoppel (by representation), the defendant must show that, if he were now required to pay back the money, he would be in worse position pecuniarily than if representation and payment had not been made to him in the first place.<sup>216</sup>

Mistaken payments constitute a natural realm for the application of estoppel in enrichment claims. However, English law traditionally took a narrow view of the recovery of mistaken payments restricting it to payments made under certain kinds of mistakes. First, payments made under mistake of fact were recoverable only if the

<sup>214</sup> J. Beaton & Bishop (1986) 36 *Univ. Toronto LJ* 149, 151-152.

<sup>215</sup> A. Burrows, *The Law of Restitution* (2002) 532.

<sup>216</sup> *Ibid.* 532.

mistake was as to liability to make the payment. This is the so called ‘supposed liability’ test.<sup>217</sup> Secondly, payments made under a mistake of law, as opposed to fact, were irrecoverable. In recent developments, both these restrictions have been judicially removed<sup>218</sup> and the English law on mistaken payments has thereby been brought into line with the pure principle against unjust enrichment.

Although it is a contested requirement, it is said that a proper reading of English case law on estoppel subtly reveals that many cases have held that there should also be a need to show a breach of duty of accuracy (i.e., special fault) by the claimant before estoppel could succeed.<sup>219</sup> Burrows, for example, analyses two sets of apparently conflicting cases in which he thinks one set supports the breach-of-duty requirement, while the other regards such requirement as merely being an alternative rather than an essential ingredient of estoppel. In *RE Jones Ltd v Waring And Gillow Ltd*<sup>220</sup> and *Weld-Blundell v Synott*<sup>221</sup> the defence of estoppel was pleaded but it failed on the ground that there was no breach of duty. In the first case, the claimants had been tricked by a rogue into paying £5,000 to the defendants under a contract with the rogue. In allowing the claimants restitution of the mistaken payment, the decision of the majority in the House of Lords was that there could be no defence of estoppel because there was no breach of duty owed by the claimants to the defendants in making the overpayment. In the later case,<sup>222</sup> where the claimants had miscalculated their own entitlement in a mortgage arrangement and

<sup>217</sup> In the application of the supposed ‘liability test’ in real cases two main exceptions can be identified. The first is revealed by a group of cases which could only be justified on an extended meaning of supposed liability, and the second, cases which cannot be justified even on that extended meaning. In the first group fall all cases in which the claimant paid the money to the defendant under the mistaken belief that he was bound to do so under a legal liability to a third party.; and in the second group all cases that do not fit in the first and in any event cannot be justified under the traditional ‘supposed liability test’ such as many cases on the rescission of formal gifts on the ground of mistake. These last cases have traditionally required merely that the mistake of fact be a serious one and not one of supposed liability. (See generally A. Burrows, *The Law of Restitution* (2002) 134 footnotes 11-13.

<sup>218</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 especially at 372.

<sup>219</sup> A. Burrows, *The Law of Restitution* (2002) 529; See also K. Zweigert & Kötz, *An Introduction to Comparative Law Vol. II* (1977) 254 (Weir translation) who say of English law: ‘In cases of payment by mistake English judges tend to ask which of the parties was responsible for the error in the particular case and which of them should bear the loss in view of the underlying relationship. Another relevant factor is whether either party was guilty of any breach of duty to the other’.

<sup>220</sup> *RE Jones Ltd v Waring And Gillow Ltd* [1926] AC 670.

<sup>221</sup> *Weld-Blundell v Synott* [1940] 2 KB 107.

<sup>222</sup> *Ibid* 114-115.

hence paid over too much to the defendant, the court allowed the claim and rejected the defence of estoppel by holding that ‘when the decisions as to estoppel in connection with payment of money under a mistake of fact are closely examined, much seems to turn on whether the payer was subject to a duty as against the payee to inform him of the true state of the account – in effect, a duty not to make a mistake of fact in that regard’.<sup>223</sup> But in the earlier case of *Holt v Markham*,<sup>224</sup> estoppel was successfully invoked without any requirement of breach of duty; and in other earlier cases<sup>225</sup> breach of duty was regarded as an alternative to, rather than an essential ingredient of, estoppel.

After highlighting these discrepancies, Burrows concludes that they are not irreconcilable and that their result can be harmonised if one considers that where the payer owes a duty to the payee to pay over the correct money there is a factual representation inherent in the payment that that is money owed to the defendant that is being paid. In contrast, most payments do not carry an inherent factual representation that the payee is entitled to the payment and the defendant needs therefore to show a representation collateral to the payment if he is to make out an estoppel.<sup>226</sup> Therefore, reconciliation can be achieved by stating that there must be either a breach of duty, and hence an inherent representation, or a collateral representation.<sup>227</sup>

In sum, estoppel by representation that constitutes a defence in unjustified enrichment in English law entails a representation which is either collateral or inherent, and leads to a prejudicial change of position on the part of the defendant as a result of reliance upon the said representation. It is also clear that, despite the recognition of change of position as a general defence, there is still space for the estoppel doctrine, for there are cases which cannot be catered for under the change of position doctrine but which can fully be explained and handled under estoppel. Estoppel operates as an all-or-nothing defence and to that extent is clearly distinct from change-of-position. In the same vein, the

<sup>223</sup> Ibid 115.

<sup>224</sup> *Holt v Markham* [1923] 1 KB 504.

<sup>225</sup> *Skyring v Greenwood* (1825) 4 B & C 281; *Deutsche Bank v Beriro & Co* (1895) LT 669; A. Burrows, *The Law of Restitution* (2002) 531.

<sup>226</sup> Compare with Birks, *An Introduction to the Law of Restitution* (1985) 402-407.

<sup>227</sup> A. Burrows, (2002) 531.

requirement of prejudicial representation makes it very distinct from change-of-position which does not require that aspect to be pleaded successfully.

#### 2.3.4. Ministerial Receipt or Payment Over.

In English law, an agent who has paid over money to his principal has a complete defence to a claim in unjustified enrichment (restitution) brought against him, because it is thought the appropriate defendant is the principal. For this reason, it is sometimes argued that ministerial receipt is not really a defence to the claim itself but rather a means of identifying the correct defendant.<sup>228</sup> But this view is not entirely shared in many English cases nor by many writers, as evidenced by Goff & Jones who regard this defence as a species of change of position, albeit with special features because of the agency context in which it operates;<sup>229</sup> and by Swaddling,<sup>230</sup> who argues that ‘the real reason for the defence is that the plaintiff is in certain circumstances stopped from bringing a claim against an agent who has done no more than follow his (i.e; plaintiff’s) instruction and make a payment over to his principal’. Birks, however, holds the view that the ‘principal recipient’s agent can be sued in unjust enrichment in two situations, namely (i) if the agent has not paid over, or to the order of, the principal, and (ii) if, though the agent has so paid over, he did so with notice of the plaintiff’s claim’.<sup>231</sup> (Burrows deals with the issue in detail, but it is remarkable that instead of discussing it as part of the chapter on defences, he places it in a category headed as ‘miscellaneous’ issues: agency and the conflict of laws’ in the 2000 edition of his book on Restitution).<sup>232</sup>

<sup>228</sup> *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202, 207 (per Millett, LJ).

<sup>229</sup> R. Goff & G. Jones, *The Law of Restitution* 6<sup>th</sup> edition (2002) 833-33.

<sup>230</sup> W. Swadling in P. B. H. Birks (ed.) (1995) 243.

<sup>231</sup> P. B. H. Birks, *The Foundations of Unjust Enrichment: Six Centenary Lectures* (2002) 137. See also the cases of *Kleinwort and Co V Dunlop* (1907) 97 263 (CA); *Gowers v Lloyds and national Provincial Bank* [1938] 1 All ER 766 (CA).

<sup>232</sup> A. Burrows, *The Law of Restitution* (2002) 597-625 (chapter 16 of the book, while defences are discussed in chapter 15).

There are at least five<sup>233</sup> elements characterizing this defence in English law: first, the benefit must be received in a ministerial capacity, that is to say the defendant must receive such benefit *qua* agent; secondly, such an agent must be acting for a disclosed as opposed to an undisclosed principal; thirdly, he (the agent) must have paid the money over or otherwise acted to his detriment; fourthly the payment over must precede any notice of the claimant's right of recovery; and fifthly, the agent must not have knowledge of or be privy to any wrongdoing which resulted in the benefit.<sup>234</sup>

Like change-of-position, the ministerial-receipt defence is not available to an agent who is a wrongdoer. Stated positively, good faith (or 'without notice' – as good faith is sometimes referred to in this context) is a requirement *sine qua* the defence will be lost. One oft-cited example is an old case *Snowdon v Davis*,<sup>235</sup> in which the agent who claimed the defence was considered as a wrongdoer and was denied the defence. In that case, the plaintiff paid money under duress of goods levied by the defendant bailiff (the agent of the sheriff) in excess of his powers while executing a writ for so-called 'distress of goods'.<sup>236</sup> The bailiff paid the money over to the sheriff and resisted an action for money had and received on the ground that he had paid over. The defence was rejected in the circumstances and the court held that it did not apply in cases of compulsion or extortion of money *colore officii* in excess of authority. Sir James Mansfield CJ (not the famous Lord Mansfield) who delivered the judgment added further that 'the plaintiff pays it under terror of process, to redeem his goods, not with an intent that this should be delivered over to anyone in particular'.

<sup>233</sup> Swadling thinks that there are only four elements (a) the receipt must be ministerial, not beneficial; (b) the recipient must have passed on the benefit to his principal; (c) the recipient must not be tainted by wrongdoing and (d) the claimant must have known he was making a payment to an agent. With this analysis he further concludes that this defence can only operate in the context of unjust factors such as mistake or failure of consideration. It cannot be relied upon in cases of duress or restitution for wrongs, nor significantly in cases of ignorance, where the claimant gave no consent to the transfer. In such case, Swadling argues, the claimant cannot fulfill the fourth requirement above (d) and knowingly make a payment to an agent (see W. Swadling, in P. B. H. Birks (1995) 259-260).

<sup>234</sup> G. McMeel, *The Modern Law of Restitution* (2000) 437.

<sup>235</sup> (1808) 1 *Taunt* 359, 127 ER 872.

<sup>236</sup> Basically a warrant for 'distress of goods' can be described as a writ authorizing the seizure of goods for the purpose of satisfying either a debt or other obligation, or for the purpose of discharging someone's liability.



In more recent judgments the same rationale continues to be applied.<sup>237</sup> For example, in *Agip (Africa) Ltd v Jackson*,<sup>238</sup> a case that still manifests the perennial problem of the English law division between common law claims and equity claims, leading to contradictory and often unprincipled results,<sup>239</sup> Millet J concluded (at 288) that

‘there is a clear answer to the plaintiff’s claim for money had and received. Jackson & Co. must be treated as being in the same position as an agent who has accounted to his principal. Money paid by mistake to such an agent cannot afterwards be recovered from the agent but only from the principal. In every previously decided case the agent has received the money directly from the plaintiff, and it is well established that to obtain the benefit of the defence the recipient must have been known to the plaintiff to have been acting for a disclosed principal. In such a case the agent is treated as a mere conduit pipe and the money is taken as having been paid to the principal rather than the agent’.<sup>240</sup>

Since the principal in this instance was a company which the judge considered to be a shell payee, the judge concluded it could not avail itself of the defence (although he appeared to have allowed the money laundering accountants to benefit from the defence, the judge nonetheless observed that the defence was not available to somebody who was implicated in the principal’s fraud).

A direct mention of the relationship between change-of-position and ministerial receipt is to be found in *Portman Building Society v Hamlyn Taylor Neck*.<sup>241</sup> In this case, Millett LJ, rejected the attempt to merge two defences. He states:

<sup>237</sup> *Keegan v Palmer* [1961] 2 Lloyd’s Rep 499; *Agip (Africa) Ltd v Jackson* [1990] Ch 267. Burrows thinks that this line of cases can be explained on the basis that the agents, even if acting within their authority, could not be said to have paid over the money *bona fide*.

<sup>238</sup> [1990] Ch 267. This case was upheld by the Court of Appeal and is reported at [1991] Ch 547.

<sup>239</sup> In this case for example the accountants were clearly wrongdoers and they should not get the benefit of the defence. But due to the traditional division of common law claims and equity claims, in which the elements of liability may differ, the accountants were acquitted, because the position of the agent is not treated in equity claims as giving rise to a special defence. Rather liability in knowing receipt (as Millet J considered the claim based on knowing receipt – which is the equity form) is treated as only attaching to one who receives beneficially, rather than ministerially. So agents are excluded by the definition of the cause of action framed in equity.

<sup>240</sup> *Agip (Africa) Ltd v Jackson*, [1990] Ch 267 at 288.

<sup>241</sup> [1998] 4 All ER 202.

'I myself do not regard the agent's defence in such a case as a particular instance of the change-of-position defence, nor is it generally so regarded. At common law the agent recipient is regarded as a mere conduit for the money, which is treated as paid to the principal, not to the agent. The doctrine is therefore not so much a defence as a means of identifying the proper party to be sued. It does not, for example, avail the agent of an undisclosed principal; though today such an agent would be able to rely on a change-of-position defence. The true rule is that where the plaintiff has paid the money under (for example) a mistake to the agent of a third party, he may sue the principal whether or not the agent has accounted to him, for in contemplation of law the payment is made to the principal and not to his agent. If the agent still retains the money, however, the plaintiff may elect to sue either the principal or the agent, and the agent remains liable if he pays the money over to his principal after notice of the claim. If he wishes to protect himself, he should interplead. But once the agent has paid the money to his principal or to his order without notice of the claim, the plaintiff must sue the principal'.<sup>242</sup>

In any event, the result in this case could not have been different, because in addition it was also fatal to the claim that the money was paid pursuant to an operative binding contract whereby the defendant solicitors were required to transfer the money in accordance with the instruction of the lender.

In sum, in English law there are two views of the defence of ministerial receipt. The first is that only the principal can be sued in unjust enrichment, and on this view it does not matter whether the principal receives the money or not because payment to the agent constitutes payment to the principal.<sup>243</sup> The second view is that an unjust enrichment claim does lie against the agent (or against the principal) unless the agent has in good faith paid the money over to his principal, or done something equivalent, in which case only the principal is liable in unjust enrichment.<sup>244</sup>

There is no conclusive answer in English law to the question whether ministerial receipt (or payment over, as it is sometimes called) is different from the change-of-position defence. Both the case law and academic writers are divided to the extent that these

<sup>242</sup> *Portman Building Society v Hamlyn Taylor Neck* [1998] 4 All ER 202 at 207.

<sup>243</sup> See A. Burrows (2002) 600 and cases cited there that range from the year 1766 to 1991.

<sup>244</sup> See A. Burrows (2002) 602. Cases in support to this approach also date back to 1777 and as recently as 1998, if not later.

defences are different or overlap and/or one is swallowed by the other. But it is not disputed that whenever there is payment over and there are elements of change of position in that specific circumstance, the context itself can be described as being concerned with identifying the proper party to be sued rather than as merely going to a defence. And that description, which Burrows supports, does not seem to contradict any holding that payment over is an aspect of change of position, for whatever position is assumed, the principal and the agent are *prima facie* liable, subject to defences. And if in the application of payment over there is a necessity to ascertain whether detriment or prejudice is central to that defence as it is central to change of position, then the most plausible scenario is to say that payment over has been swallowed by change of position defence.<sup>245</sup>

### 2.3.5. *Concluding Remarks.*

With the exposition above it is clear in today's English law of unjust enrichment the defence of change of position assumes a central role, it is both a means of avoiding excessive restitution and protecting the security of receipts by innocent defendants. Several elements that had previously been explicable in terms of the concepts of the *bona fide* purchaser for value, estoppel and the payment over doctrine are or can now adequately be catered for by the defence of change of position. However, the role of other defences remains important for specific cases in respect of which change-of-position is not an adequate defence and its application would be inappropriate.

## 2.4. Change of Position and other Enrichment Defences in Canadian Law.

### 2.4.1. *Introductory Remarks.*

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<sup>245</sup> See similar position advocated in the Australian case *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp.* (1988) 78 ALR 157.

Early developments of the Canadian law of enrichment (the common-law branch) to a great extent mirrored that of England, with a clear manifestation of the historical interrelation between the law of unjust enrichment and the law of contract, which in a considerable number of cases led to the attempted utilization of contractual defences to enrichment causes of action. But due to Canada's proximity to the United States of America, with which it has a great interchange of ideas as well as for other reasons, and other factors, the Canadian enrichment law soon started diverging from several aspects of English law authorities.<sup>246</sup>

The most important early departure was the recognition of unjust enrichment as a separate doctrine, independent of other obligations, which can be traced back to *Delgman v Guarantee Trust Company and Constantineau*.<sup>247</sup> This was a doctrine to which the older contractual limitations would hence forth no longer be applied unless there were good reasons in so doing. This recognition was consolidated in the authoritative formulation of the elements of unjust enrichment in *Pettkus v Becker*<sup>248</sup> as well as the approach that the Canadian law of unjustified enrichment requires proof of a 'negative' factor instead of the 'positive' factor as asserted in *Garland v Consumer Gas*.<sup>249</sup>

<sup>246</sup> See for example *McCarthy Milling Co v Elder Packing Co* (1973) 33 DLR (3d) 52; more recently *Air Canada v British Columbia* (1989) 59 DLR (4<sup>th</sup>) 161 (SCC) par. 194-197. The English case *CIR v Deutsch Morgan Grenfell Group Plc* [2006] 2 WLR 103 (EWCA) also make such mention at par. 67 (per Jonathan Parker LJ).

<sup>247</sup> [1954] 3 DLR 785 (S.C.C.). in this case Rand and Cartwright J.J. decided the matter at issue, which involved a claim for the enforcement of a contract, but which was unenforceable for being incongruent with the Statute of Frauds, because it was not in writing as required, both judges proceeding on the footing that, quite apart from contract, there was a distinct head of recovery, derived from the notion of unjust enrichment.

<sup>248</sup> (1980) 117 DLR (3rd) 257 (SCC) at 274. In this case, as already mentioned elsewhere Dickson J authoritatively stated that the cause of action in unjust enrichment consist of: '(i) an enrichment to the defendant, (ii) a corresponding deprivation to the plaintiff, and (iii) absence of any juristic reason for the defendant's enrichment'. For a sustained criticism of the third element and its application on subsequent cases see M. McInnes (2000) 79 *Can Bar. Rev* 459; L. D. Smith (2000) 12 *Supreme Ct L Rev* (2d) 211.

<sup>249</sup> [2004] SCC 25 and [2004] 1 SCR 629; (2004) 237 DLR (4<sup>th</sup>) 385. Since the decision in *Pettkus v Becker* (1980) 117 DLR (3rd) 257 that advanced 'juristic reason' as the third element for enrichment liability in Canada, there has been a confusion whether the test of enrichment in Canada required proof of a negative or positive factor. In *Garland v Consumers Gas* [2004] 1 SCR 629; [2004] SCC 25; (2004) 237 DLR (4<sup>th</sup>) 385 the Supreme Court of Canada finally resolved the dispute. Iacobucci J who delivered the court's judgment dealt with the definition of 'absence of juristic reason' and related issues roughly from pages 40-46 of the judgment. After discussing the academic and judicial debate surrounding 'juristic reasons' versus 'unjust factors', in particular the difficulty of requiring a plaintiff to prove a negative, the court proposed a reformulation of the Canadian test. Thus from the year 2004 on the reading of *Garland's* case the proper approach to 'juristic reasons' encompasses two distinct steps. First the 'plaintiff must show that no juristic

Despite this independent development, all of the various roots of the Canadian law of unjust enrichment - the historical reliance on notions of 'just and equitable', 'unjust enrichment' or 'implied contract' as the 'initial' doctrinal basis<sup>250</sup> for the law of enrichment - have combined in the development of defences peculiarly suited to enrichment causes of action.<sup>251</sup> The defences generally raised against enrichment claims in Canadian law include, inter alia, *res judicata* and election, limitation provisions (prescription), change-of-position, estoppel, illegality and the role of the innocent third party (*bona fide* purchaser for value without notice) and payment over (agency or ministerial receipt). The list is not exhaustive, but ultimately most of the defences have a counterpart in English law and it can safely be said they are almost the same as in English law, differing only in nuances. (The defences that have not been specifically mentioned here are not as prominent as the ones mentioned, or if they are equally prominent, they present fewer problems in relation to the topic of this study). It is interesting to note that *res judicata* and election are treated together as they are often pleaded in the same cases and this association is to some extent peculiar to Canadian law. It is also important to note from the outset that most principles of Canadian enrichment law developed in the particular context of marital relationships, and that very fact may have left its mark on the defences as well. This last observation is particularly true on the defences of *res judicata* and election, among others, but the topics on agency (payment over) and some enrichment issues emanating from bills of exchange are sometimes treated together.

The discussion that follows placed emphasis on change-of-position, *res judicata* and election and payment over, because these defences have important nuances in Canadian law that are not apparent in other jurisdictions.

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reason from an established category exists to deny recovery' with the established categories comprising a contract, a disposition of law, a gift, and other valid common law, equitable or statutory obligations'. The court finally argued that by closing the list of categories the 'objection to the Canadian formulation of the test that it required proof of a negative is answered'. Secondly, once a *prima facie* case is established under step one, the burden of proof in step two is placed on the defendant to show any reason why the enrichment should be retained. The court however emphasised that 'restitution was an 'equitable remedy', and as such the second step required careful examination of the 'reasonable expectations' of the parties, and 'public policy considerations'.

<sup>250</sup> See P. H. Winfield (1948) 64 *LQR* 46.

<sup>251</sup> G. H. Fridman & J. C. McLeod, *Restitution* (1982) 589.

### 2.4.2. *The Change-of-Position Defence in Canadian Law.*

Unlike in England, where the general recognition of the defence came late, change of position had been accepted in Canada for a number of years as a defence of general application throughout the law of unjust enrichment (and it was not restricted to its original particularised application with respect to agency, and bills of exchange). In *Storthoaks v Mobil Oil Canada Ltd.*<sup>252</sup> where the Supreme Court of Canada explicitly dealt with this defence and implicitly sanctioned it as being of general application, the court specifically held that change of position was a defence to a claim to recover money paid under mistake. The approach adopted in this case is a clear manifestation of the Canadian interrelation with the United States.<sup>253</sup> In trying to keep with the American position that had earlier sanctioned the defence in section 142 *Restatement of the Law of Restitution*, the Canadian Supreme Court distanced itself from the English approach and was willing to hold that ‘the right of a person to restitution from another because of a benefit received was terminated or diminished if, after the receipt of the benefit, circumstances had so changed that it would be inequitable to require the other to make full restitution’. On reading the facts of the case it is self-evident that the issue of general applicability of the change-of-position defence was squarely accepted in the *Storthoaks* case, though the case itself was mostly connected with a mistaken payment. In this case money had been paid out under a mistake of fact to a municipality by a company. The municipality argued that the money received from the company was put into a general account along with tax money to pay general everyday expenses. It was held that, prima

<sup>252</sup> (1975) 55 DLR (3d) 1,13 (SCC).

<sup>253</sup> For the view that Canadian law of enrichment distanced itself from old English authorities and moved closer to the United States, see generally Klippert (1980) 30 *Univ. Toronto LJ* 356, 363-364. The author identifies at least four stages through which Canadian law of enrichment has passed since *Delgman* case. The first is the clear recognition by the Canadian Supreme Court that liability on restitutionary issues is based on unjust enrichment; secondly, the judiciary initially reacted against accepting the principle of unjust enrichment as one of general applicability; thirdly, the reaction gradually decreases, and the acceptance of the principle gained momentum; and fourthly the recognition that the new principle requires refinement, with the result that the judiciary develops control devices limiting the circumstances in which the principle is applied. Change of position defence in such structure of development is indeed one of such devices limiting the general applicability of the principle.

facie, the company was entitled to recover the money as money paid on a mistake of fact. The defendant however alleged to be entitled to retain the money on the basis of change of position or estoppel. Both defences failed, but they were fully discussed and the court was prepared to accept them if the evidence of the defendant were satisfactory. The court also opined that estoppel and change-of-position were separate doctrines of general application throughout the law of restitution. In Canada, as a matter of general policy, the defence of change of position ought only to be allowed if the conduct of the recipient was not tortuous and if he was no more at fault for the receipt or dealing with the subject matter than the claimant was.<sup>254</sup>

There is also a trend in the cases that the defendant must establish that he has entered into a transaction or legal relationship which he would not otherwise have done had he not been in receipt of the particular funds in question.<sup>255</sup> In the same vein, the defence has a dual feature: it may be a partial defence, as well as a total defence. For example, if a defendant receives money under mistake and invests it in shares which afterward depreciate in value before he is aware that the money so received was not his to keep, he will only be obliged to disgorge the value of the shares at the time he is put into notice, as long as he can establish that such an investment would not have been made without the particular money in question.<sup>256</sup>

There is still some uncertainty in Canadian law as to the extent to which the doctrine of change of position applies to proprietary restitutionary claims.<sup>257</sup> It was highlighted elsewhere in this chapter that the common-law in general considers the law of unjustified enrichment as encompassing both rights *in rem* and rights *in personam*. That is also true of Canada. Based on the notion of enrichment law as encompassing also right *in rem*, the

<sup>254</sup> G. H. Fridman & J. C. McLeod, *Restitution* (1982) 607-608 and cases cited there.

<sup>255</sup> *Storthoaks v Mobile Oil Canada Ltd* (1975) 55 DRL (3d) 1 (SCC); *Nepean Hydro Electric Comm. v Ontario Hydro* [1982] 41 NR 1 (SCC).

<sup>256</sup> *Purity Dairy Ltd v Collison* (1966) 58 DLR (2d) 67 (B.C.C.A.); *Midland-Olser Securities Ltd v Dudek* (1966) 56 DLR (2d) 378 (Man).

<sup>257</sup> 'Restitutionary proprietary' rights that give rise to restitutionary proprietary claims arise whenever no transaction has taken place which is effective to deprive the plaintiff of his title to the property in question or where, to prevent defendant's unjust enrichment, it is necessary to allow the plaintiff the additional benefit flowing from a proprietary claim as opposed to a purely personal claim.

Canadian courts have imposed so-called constructive trusts,<sup>258</sup> for example, in matrimonial cases such as *Pettkus v Becker*. But the extent to which the right *in rem* is part of the law of enrichment is not always clear and the uncertainty of that fact is reflected on the defences as well. On the one hand, as a matter of general policy, it seems unjust to impose, for example, a constructive trust or lien on the assets of a defendant, in circumstances where he has changed his position in detrimental reliance on his rights to the funds or property. In any event, as long as the actual property or something clearly attributable to the property can be returned without causing substantial harm to the defendant, no change-of-position will be established.<sup>259</sup> On the other hand where the proprietary claim asserted is a legal proprietary claim<sup>260</sup> as opposed to an equitable right,<sup>261</sup> the applicability of the doctrine of change of position is less clear, for it is commonly said that the common-law right to trace is generally more easily lost than the equitable right. Be it as it may, common law writers think that if a proper case arises, there seem to be no reason on general principle to deny the applicability of the defence to the cases of a legal proprietary claim.<sup>262</sup> From the discussion above it is clear that the defence of change of position in Canada has some peculiarities not found elsewhere.

#### 2.4.3. *The Estoppel Defence in Canadian Law.*

Like in England, estoppel in Canada is an evidentiary rule,<sup>263</sup> and as such it can defeat plaintiff's claim *in limine*. For this reason it operates *in toto*.<sup>264</sup> It requires a

<sup>258</sup> For more details on constructive trusts remedies in unjust enrichment see M. M. Litman (1988) 26 *Alberta L R* 407, especially 431-437.

<sup>259</sup> This aspect is generally referred to as the tracing mechanism.

<sup>260</sup> Proprietary restitutionary claim is mostly known in civil law world as one that is able to support a *rei vindicatio*.

<sup>261</sup> I alluded elsewhere this perennial common law problem of dividing law and rights into common law (legal) rights and equitable rights. The distinction makes usually little sense and has very little logical structure, but it is still adhere to in Canada and many other common law countries, and one has to live with it and hope that one day it will be done out with.

<sup>262</sup> G. H. Fridman & J. C. McLeod, *Restitution* (1982) 612.

<sup>263</sup> *Bank of Montreal v Glendale (Atlantic) Ltd* 20 NSR (2d) 217.

<sup>264</sup> Due to this harsh effect of estoppel, Fridman & McLeod, (*Restitution* (1982) 618) back in 1982 opined that the doctrine of estoppel within the confines of the law of restitution should, by analogy to the doctrine of change of position, be treated as a matter of substantive law and not a matter of evidentiary law alone. In this way, the authors thought that once the doctrine of estoppel was established (as substantive rule), the



representation by the plaintiff in reliance upon which the defendant has acted to his detriment. Estoppel only applies to proceedings between the parties; the dividing line between estoppel and change of position is the need that there should have been representation to invoke the doctrine of estoppel. As Birks put it, change of position is like estoppel with the elements of representation struck out.<sup>265</sup> However, estoppel by its nature incorporates the change-of-position doctrine by requiring reliance. In addition however, before the plaintiff can rely on estoppel he must show that there has been some representation so as to amount to prejudicial conduct on the part of the other party before he may put forward his detrimental reliance as ground to bar the other side from denying the truth of the representation. Breach of duty is not a requirement for estoppel in Canada and the cases seem to establish that the doctrine of estoppel is a doctrine of general application throughout the law of restitution. The doctrine of change of position is distinct from the doctrine of estoppel, for each has its own different elements.

#### 2.4.4. *Res Judicata in Canada.*

Like in many other jurisdictions, it is well established in Canadian law that a judgment of a court of competent jurisdiction on the merits of the case may not be challenged on the grounds that the decision itself was wrong in law or fact. The fundamental values being protected by such a norm are the interests of the parties themselves, the administration of justice in general and the concern of the public at large that there is an end to litigation. It is not a novelty that a decision of a competent court might turn out to be wrong and one of the parties may be aggrieved by such a decision. All legal systems have built-in safeguards in the structure of the law itself and ordinarily where an individual appears aggrieved as a result of a decision of a court of competent jurisdiction, the proper procedure is to appeal the decision to the appropriate appellate body or to seek a review as the case may be. Until a judgment is set aside or reversed it is conclusive as to the

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extent of estoppel should be determined by reference to the extent of the prejudicial conduct. Whether this proposal has now been accepted in Canada, I have found no evidence of it.

<sup>265</sup> P. B. H. Birks, *An Introduction to the Law of Restitution* (1985) 410.

subject matter of it. The original cause of action between the parties merges into the judgment itself<sup>266</sup> and no further action can be brought on the cause of action.<sup>267</sup>

However, the parameters of establishing the *res judicata* defence may present some difficulties in particular cases where there could be complex overlaps between different causes of action and branches of law on the same facts or a factual scenario. That is particularly true of factual scenarios that produce both criminal proceedings and civil-law proceedings, or where one event has led to a chain of events. Thus in *Hamilton v Bushell*<sup>268</sup> a Canadian court was faced with one such scenario<sup>269</sup> and decided to set out the basic nature of the doctrine of *res judicata*. In the view of the court, for a defendant successfully to invoke the doctrine of *res judicata*, it is necessary to establish that the second proceedings involve the same parties and are for the same relief in substance. In this particular case the court said that the doctrine of *res judicata* did not apply to the second proceedings. As justification for denying the application of the doctrine, the court said that where reliance was placed simply on a prior criminal order of restitution, there could be no *res judicata* in the civil suit.

Further issues that prevent the application of the *res judicata* doctrine are where the tribunal that heard the previous case had no jurisdiction to deal with the matter, or where, as in *Sheaves v Graham*,<sup>270</sup> the doctrine of *res judicata* had no application because the merits of the issue were not dealt with in the previous case.

In some circumstances the factual scenario reveals that the previous proceedings that are now invoked to sustain the *res judicata* defence involved an election of remedies by the

<sup>266</sup> In *Widrig v Strazer* [1964] SCR 376 the court at one stage said: 'I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other; but he can take judgment only for one and his cause of action on both will then be merged in the one' (at 387-89).

<sup>267</sup> G. H. L. Fridman & J. C. McLeod, *Restitution* (1982) 590.

<sup>268</sup> [1980] 39 NSR (2d) 691 (CA).

<sup>269</sup> In this case the defendants were convicted for breaking-in into someone's house and were ordered to make restitution for damages caused. Subsequently, the plaintiff sues the defendant for damages resulting from a fire the defendants had set while on the premises.

<sup>270</sup> (1977) 37 NSR (2d) 272 (Co. Ct).

plaintiff. In Canadian law, it is established that where the facts of the case provided the plaintiff with a choice of remedies, the plaintiff's election as to the appropriate remedy will only be final so as to preclude him from further proceedings if he has proceeded to judgment.<sup>271</sup> Extreme protection may even exist in some circumstances. It has even been suggested that no election arises until the judgment has been satisfied.<sup>272</sup> The election scenario may, however, have involved a choice between two inconsistent rights, as opposed to a mere choice between alternative remedies. In such scenarios, in order for the plaintiff to become disentitled to a right by electing to enforce the other, he must first actually have had a choice of two rights.<sup>273</sup> If he had no such a choice, *res judicata* will be applicable. The doctrine of election presupposes that one right should be a substitute for the other and denies the party the privilege of enjoying the benefit of both. However, the doctrine of election is restricted to cases involving alternative and inconsistent rights and has no effect where the rights which are alleged to have arisen from the facts are disparate and independent.<sup>274</sup> The doctrine of election has equally no application where the jurisdiction of the tribunals involved is overlapping and the rights in issue are cumulative.<sup>275</sup>

In sum, although Canadian law has a very carefully crafted doctrine of *res judicata* with several qualifications, there is no question that if none of the exclusions above is sustained, the defence of *res judicata* will be applied and, if in the circumstances the defendant should be enriched by the application of such defence, its effect is similar to change-of-position defence when restitution is denied in full due to the loss or dissipation of the enrichment received or its destruction due to an unforeseen event. As *Garland v Consumer Gas*<sup>276</sup> confirmed, *res judicata* qualifies as one of the established categories of 'juristic reasons' for being one of the 'dispositions of law' that can finalise a dispute. Because it is a 'juristic reason' (or a *causa* in other jurisdictions), the windfall that one of

<sup>271</sup> *Widrig v Stazer* 37 DLR (2d) 629 varied 44 DLR (2d) 1 (SCC).

<sup>272</sup> *Findlay v Findlay* [1952] 1 SCR 96.

<sup>273</sup> *Findlay v Findlay* [1952] 1 SCR 96.

<sup>274</sup> *Findlay v Findlay* [1952] 1 SCR 96 at 106.

<sup>275</sup> G. H. L. Fridman & J. C. McLeod, *Restitution* (1982) 596.

<sup>276</sup> [2004] SCC 25.

the parties derives from its application is justified, even if in the process the ultimate outcome would seem unjust.

#### 2.4.5. *Payment over (Agency) in Canada.*

Based on the principle laid down in the English case *Kleinwort, Sons & Co v Dunlop Rubber Co*,<sup>277</sup> Canadian law still holds today that an agent who has received money on his principal's behalf is liable to refund the money to the payer where the money was not due, in fact, to the principal,<sup>278</sup> or if it was due and duly paid over, the agent had done so with notice of the claim.<sup>279</sup> If, however, the agent, prior to learning of the claim, had paid the money over to the principal or done something equivalent on the principal's behalf on the faith of the payment, he will have a good defence to the claim and the plaintiff will have to sue the principal.<sup>280</sup> This defence is generally known as payment over, or sometimes as 'ministerial receipt'<sup>281</sup> or simply as 'the agency defence'. The claimant in these circumstances will be required to sue the principal, because both in logic and on principle it seems unconscionable if an agent who is clearly acting on behalf of a principle were to be held liable *in personam*, thereby ignoring his innocence. By having paid over to the principal, any benefit the agent might have received has instead augmented the principal's assets and that is where the claimant must look for his redress. Because the agent, by paying over the benefit received, keeps nothing for himself, the defence of payment over naturally embodies a change-of-position type situation on the part of the agent. That is why it has been discussed frequently in the context of the change-of-position defence in general (where one such defence is available and recognised as of general application).

<sup>277</sup> (1907) 97 LT 263 at 264 (HL).

<sup>278</sup> *Teasdall v Sun life Assurance Co.* [1927] 2 DLR 502 (Ont.CA).

<sup>279</sup> See P. B. H. Birks, 'Change of Position: The Nature of the Defence...' in M. McInnes (ed.) *Restitution: Developments in Unjust Enrichment* (1996) 66-67.

<sup>280</sup> G. H. L. Fridman & J. C. McLeod, *Restitution* (1982) 619.

<sup>281</sup> P. B. Birks, 'Change of Position: The Nature of the Defence...(supra) in M. McInnes (ed.) *Restitution: Developments in Unjust Enrichment* (1996) 66.

However, if a change-of-position defence is not readily available in a particular legal system, the success of the payment over defence depends on the agent proving a genuine payment over of the benefit so received. Therefore payment over is not synonymous to a mere crediting of the principal's books of account by the agent, but a *de facto* parting with the very benefit received and its concomitant ability to deal with it.<sup>282</sup> If money has been received, such money must in fact have been used on the principal's behalf. As long as the agent retains the money within his control there is no possibility of the application of the defence unless the retention is pursuant to a settled account with the principal.<sup>283</sup>

The doctrine of payment over depends, in substance, on whether it is conscionable to order the return of the money against the agent. For that reason, where the agent has paid the money over after receiving notice of the plaintiff's claim, the defence is inapplicable. It is inapplicable in this scenario because the defendant, by virtue of knowing the existence of the claim and parting with the benefit, disqualifies himself from being considered to have acted in good faith. Furthermore, if the defendant has indeed paid over the money to his principal, but such payment is not a permanent one or it is simply a facade, and the agent's position is still in effect the same as it was prior to the payment over, the agent will be forced to disgorge the benefit so received.<sup>284</sup>

At some stage in the development of the law, it was held that the defence of payment over turns also on the conduct of the recipient, i.e, it inquires whether the defendant received the benefit now being claimed as a result of his own wrongdoing, or as a result of a wrongdoing to which he was a participant, or merely as a result of wrongdoing of which he had no notice.<sup>285</sup> On this approach, some cases went on to establish that the agent was deprived of the defence not only where he had indulged in wrongdoing on his own behalf but also where he had acted on behalf of his principal. This situation was sometimes called the 'conduit pipe' approach,<sup>286</sup> a notion that originated in an old

<sup>282</sup> G. H. L. Fridman and J. C. McLeod, *Restitution* (1982) 620.

<sup>283</sup> *British America Continental Bank v British Bank for Foreign Trade* [1926] 1 KB 328.

<sup>284</sup> [1926] 1 KB 328, 331-332.

<sup>285</sup> G. H. L. Fridman and J. C. McLeod, *Restitution* (1982) 623.

<sup>286</sup> As to 'conduit pipe' concept see *Hazlewood v West Coast Securities Ltd* (1976) 68 DLR (3d) 172, varying 49 DLR (3d) 46 (B.C.C.A.).

English case *Owen & Co v Cronk*<sup>287</sup> and, following the approach advocated in that case, the defence was sometimes held to be inapplicable.<sup>288</sup> However, the defence of change of position, of which payment over seems a subspecies, or with which it is sometimes merged, unlike the defence of estoppel, is not determined by reference to any conduct on the part of the payer. Rather, what is involved is whether the recipient has acted in such a fashion as to render it unconscionable<sup>289</sup> to order the return of the payment. However, more recent developments have questioned that approach which seemed to have been tied up with the fact that the old English cases in which the approach was developed had come to such a conclusion because the change-of-position defence was not recognised as being of a general application.<sup>290</sup>

#### 2.4.6. Concluding Remarks.

The analysis of the Canadian defences has shown that the whole of that country's enrichment law is premised on equitable considerations and this very fact influences the understanding of the change-of-position defence and its relation with other defences. That was confirmed as recently as 2004 by the Supreme Court of Canada in *British Columbia v Canada, Forest Products Ltd*<sup>291</sup> and reiterated in *Kingstreet Investment v New Brunswick Finances*.<sup>292</sup> In *British Columbia v Canada, Forest Product Ltd* the court alluded to its treatment of the passing-on defence in *Garland's* case of the same year and the close connection of that defence with the defence of change of position. The court said: 'This court refused to deal the defence of passing on (a defence that Jacobucci J correctly noted would fall under the broader rubric of change of position defence in restitution law'.<sup>293</sup> Thereafter the court remarked: 'This equitable analysis, omnipresent

<sup>287</sup> [1895] 1 QB 265 (CA).

<sup>288</sup> See generally G.H. Fridman & J.C. McLeod, *Restitution* (1982) 619-621 and authorities cited there.

<sup>289</sup> The notion of unconscionable is widespread in Australian law of enrichment. The cases there seem to use 'unconscionable' in place of 'unjust enrichment' itself. It is a manifestation unjust enrichment understood as a generic approach (see chapter 2 above).

<sup>290</sup> G. H. Fridman & J. C. McLeod, *Restitution* (1982) 621.

<sup>291</sup> *British Columbia v Canada, Forest Products Ltd* [2004] 2 SCR 74, (2004) 1 SCC 38) par. 199.

<sup>292</sup> *Kingstreet Investment v New Brunswick Finances* [2007] 1 SCC 3. par. 32-39.

<sup>293</sup> *British Columbia v Canada, Forest Products Ltd* [2004] 2 SCR 74, (2004) 1 SCC 38) par. 199.

in the restitution law context, is a good reason why the defence of passing on is best confined to that area of law’.

## 2.5. Change-of-Position and other Enrichment Defences in the Law of the United States of America.

### 2.5.1. *Introductory Remarks.*

Most of the defences discussed above in the context of English law are essentially the same in American law, although they are sometimes given different names. The nuances of the American defences, too, differ from their English counterparts. For example, estoppel is ordinarily treated alongside waiver in American law, while such association is almost unknown in English law. Prescription (limitation) is also often discussed with laches,<sup>294</sup> which is seldom discussed under current English law. The defences of change of circumstances and *bona fide* purchase for value without notice receive extensive coverage, with the former placing great emphasis on the fault requirement, while the latter is premised on the commercial function of safeguarding the finality of transactions.<sup>295</sup> Change of circumstances also often overlaps with the defence of laches, and it is analogous to estoppel,<sup>296</sup> but as will be seen below with more detail, change of circumstances is not necessarily bound up with unreasonable delay on the part of the claimant nor with any detrimental reliance on another’s representations. The passing-on defence, in turn, is not so prominent. As to the illegality defence, which will be dealt with

<sup>294</sup> Laches is an unreasonable delay in the pursuit of rights resulting in prejudice to the defendant.

<sup>295</sup> See for example the impact of Grant Gilmore’s article ‘The Commercial Doctrine of Good Faith Purchase’ (1954) 63 *Yale LJ* 1057 on current position of UCC on good faith purchase aspects and repercussions elsewhere in the private law. Examples: UCC (Uniform Commercial Code § 3-418 (1990); UCC § 3-418 Comment 1 whereby the rule denies restitution to a bank that pays a forged or an overdrawn cheque to a person who took the instrument in good faith and for value. For much older views of the defence see J.B. Ames ‘Purchase for Value Without Notice’ (1887) 1 *Harvard L R* 1. See also A. Kull (1995) *California LR* 1233-34 criticizing the excessive glorification of the commercial function of the doctrine.

<sup>296</sup> Estoppel has also some features of laches, as in modern case law it is not unusual to find the notions that a plaintiff can be estopped, for example by a long delay resulting in prejudice to the defendant. (see for example *Willmar Poultry Co v Morton-Norwich Products Inc* 520 F.2d 289 (C.A. Minn, 1975); See generally 51 *American Jurisprudence* 2d, Limitation of Actions, § 431 et seq). However, this explanation of estoppel seems nothing more than laches in a thinly disguised form.

in another chapter of this study, American law discusses it alongside the so-called 'unclean-hands' defence, which is to some extent quite separate from the illegality defence. It appears nonetheless that the 'unclean hands' defence is more discretionary than the illegality defence itself is, but the demarcation between the two defences is not always clear. In the exercise of a discretion to deny relief on the basis of 'unclean hands', the courts require that the claimant's inequitable conduct must be related to the identical transaction in which he seeks relief, as misbehaviour of a collateral nature which bears no relation to the transaction sued upon is disregarded. In this respect, since the illegality defence developed more in equity than at law, it is still often held that 'equity does not demand that her suitors lead blameless lives'.<sup>297</sup> Another important issue in American law, which may not necessarily be apparent in other jurisdictions, especially in civil-law countries, is the question: from which date does time begin to run for the purposes of limitations (prescription)? That is important because in general terms, for the purpose of statute of limitations, time begins to run from the date the cause of action arose. That is not necessarily the case in equity, which is still found in American law, although the courts have been merged long ago.<sup>298</sup> However when restitution is sought, the enriching transaction may have been at one time, and the receipt of the benefit at another, and the discovery by the claimant of the fact at yet another. Ordinarily, when the action is based on unjust enrichment, the favoured view, although not unanimous, is that time begins to run from the date of the receipt of the benefit. This view is, however, in sharp distinction to the reality when prescription is not in issue, because ordinarily for a claim in unjust enrichment the measurement of the defendant's enrichment is calculated as of the time of the institution of the claim (*litis contestatio*).

Be it as it may, what binds all the defences mentioned above together is the fact that if they are successfully pleaded, their outcome is to leave a windfall in the hands of the defendant, although the extent of the windfall may vary from defence to defence. Whether such a windfall in the hands of the recipient is justified or not it will transpire from the discussion that follows on each defence or collectively treated.

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<sup>297</sup> See G. Douthwaite, *Attorney's Guide to Restitution* (1977) 368.

<sup>298</sup> There appear to be four American States that still have separate equity courts.



### 2.5.1. *The Change-of-Circumstances Defence in American Law.*

As pointed out in chapter one, the American law of unjust enrichment varies considerably among the various States, with some still using the language of quasi-contract and implied contract, while others have departed from that language. That variation in the cause of action is noticeable in the defences available in respect of a particular claim and, as we have seen, there is much overlap between the defences. Nevertheless, the defence of change of circumstances is accepted in most States<sup>299</sup> and its development can generally be said to have followed a three-stage<sup>300</sup> trend, - a trend which was especially visible in New York. It should be mentioned that American law does not hesitate to depart from the English-law approach whenever it deems it necessary and opts for a more principled approach rather than adhering unquestioningly to the views expressed in the old English authorities. This approach enabled a revolution in the law of restitution and unjust enrichment. The change in thinking over time was not an even one and can be gleaned from a variety of sources, including case law, and other legal instruments [statutes] and even academic writings.<sup>301</sup> As the bulk of unjust enrichment claims arise out of mistaken transfers or payments, that is also where most elements were first focused in the early development of the defence,<sup>302</sup> but the field is now wider and the importance of mistake itself is no longer relevant. Let us consider the details of the three phases themselves.

In the first stage, the courts adopted the view which prevailed in England until 1991, namely that money paid under mistake was recoverable without regard to any subsequent alteration of position, subject to special exceptions in relation to payments to agents and

<sup>299</sup> For the almost universal acceptance of the defence in American law see generally 66 *American Jurisprudence* (2002) §§ 134 – 154.

<sup>300</sup> For a more detailed discussion of these phases, especially in New York, see generally R. J. Sutton in J. B. Elkind (ed) *Impact of American Law on English and Commonwealth Law* (1978) 166ss.

<sup>301</sup> See for example the comments of M.P. Gergen (2005) 84 *Texas LR* 173, 181—183 on a recent book on the theory of Restitution and cases there cited.

<sup>302</sup> On the importance of mistake in the law of unjust enrichment in current America see M.P. Gergen (2005) 84 *Texas LR* 173, 181—183; and M.P. Gergen (2003) 56 *Current Legal Problems* 289, 304-05; *Restatement (Third) of Restitution And Unjust Enrichment* § 5 (Tentative Draft No. 1 (2001)).

payments on the faith of forged commercial papers (bills of exchange).<sup>303</sup> This position was essentially based on the argument that whenever there has been a mistaken payment, legal title remained in the payer, and that in these circumstances the party having the legal right must prevail, regardless of whether the party receiving such payment had incurred liabilities or paid money which he would not otherwise have done, except for the receipt of the money. In other words, loss had always to be borne by the payee, because he had, so to say, an 'inferior' legal right, if any. In my view, this absolute right to restitution certainly gave the claimant too little incentive to guard against mistaken transfers and justice could not always be seen to be done.

In the second stage, the defence of change of circumstances became available in any case where the payer had been negligent, the concept of 'negligence' being gradually widened to the point where failure by the payer to take adequate steps to look after his own interests was regarded as negligence. Hence in *Mayer v Mayor of New York*,<sup>304</sup> the courts for the first time held that

'[t]he general rule that money paid under mistake of material fact may be recovered back, although there was negligence on the part of the person making the payment, is subject to the qualification that the payment cannot be recalled when the position of the party receiving it had changed in consequence of the payment and it would be inequitable to allow a recovery. The person making the payment must, in that case, bear the loss occasioned by his own negligence'.

In subsequent cases the concept of 'negligence' advocated in this case in its wider sense of 'carelessness' was consolidated and extended. At some point the courts began to make findings of negligence in circumstances of very slight blame. Forgetfulness, delay in inquiring into one's legal rights,<sup>305</sup> and even the failure to check out an insured's own statements before paying out to his estate, were just few of the examples in the cases

<sup>303</sup> The cases involving bills of exchange were generally distinguishable from the rest because in these cases it was thought that one party had superior capacity to discover the mistake.

<sup>304</sup> 63 NY 455 (1875), 457.

<sup>305</sup> *William v State* 25 NYS 2d 866 (1942) where a delay of the plaintiff in inquiring into its legal rights was held as sufficient to ground the defence of change of circumstances. So was *Semble Nusbaum v Rialto Securities Corp* 264 NY Supp. 513 (1933) where the plaintiff's forgetfulness was enough for the defence to succeed.

regarded as sufficient to bring the change-of-circumstances defence into play. For example in *Continental National Bank v Tradesmen's National Bank*,<sup>306</sup> a bank erroneously paid out on a cheque which had been fraudulently 'raised' after certification. Recovery was precluded because the bank could, with a better business system, have discovered the forgery and prevented the cheque being relied upon during its currency and after payment. The same reasoning appears at the same time beyond New York in *Copper Belle Mining Co of West Virginia v Gleeson*,<sup>307</sup> in which it was held that 'where the plaintiff alone is at fault, or his fault is greater than that of the defendant', (...) 'alteration of position of the defendant is a defence to an action for the recovery of the money by the plaintiff'.<sup>308</sup> The limits on the doctrine of relief for mistaken payments was once again reaffirmed shortly afterwards in *Ball v Shepard*,<sup>309</sup> and there a further tag was added to the reasoning namely that if the payment did not arise in the 'transaction between the parties to the action', then recovery could not be had in any circumstances.<sup>310</sup> The development also took into account situations where either party is equally to blame for the mistake or equally innocent thereto. In these circumstances, as a general rule, it was commonly held that an alteration on the part of the payee had to prevent liability in action for recovery.<sup>311</sup>

In the third and final stage, which can generally be said to represent the current position of the defence, negligence was almost discarded altogether as a basis for the defence,<sup>312</sup> and the courts acknowledged that the defence was available in any case where an order

<sup>306</sup> 173 NY 276, 286; 65 NE 1108, 1118, 1113 (1903).

<sup>307</sup> 14 Ariz 548, 134 P 283 (1913).

<sup>308</sup> This position is still present today in many other States. For example as recently as the year 2000 in *Wilson v Newman* 617 NW 2d 318 (2000) the fault requirement is still applied. Hanoch Dagan who has recently written a book on the modern theory of restitution (*The Law and Ethics of Restitution* (2004)) has suggested that the law should shift to the comparative fault regime to allocate a loss resulting from a mistaken transfer by highlighting the desirable incentive effect of comparative fault on precaution. But see M. P. Gergen (2005) 84 *Texas LR* 173 for criticism of this approach.

<sup>309</sup> 202 NY 247; 95 NE 919 (1911).

<sup>310</sup> 202 NY 247, 253; 95 NE 719, 721 (1911).

<sup>311</sup> See for example *Lake Gogebic Lumber Co. v Burns* 40 ALR 2d 993 (1951).

<sup>312</sup> *America Nursing Resources Inc v Forest T Jones & Co. Inc* 812 SW 2d 790 (Mo Ct. App WD 1991); *Warrior River Towing Inc. v Kennedy* 574 So 2d 843 (Ala. Civ. App. 1990); *Toupin v Laverdiere* 729 A 2d 1286 (R.I. 1999); *Blue Cross Health Services Inc v Sauer* 800 SW 2d 72 (Mo. Ct App. Ed 1990).

for restitution would impose a net loss on the payee.<sup>313</sup> In *Paramount Film Distributing Corp. v State of New York*<sup>314</sup> the New York Court of Appeals decided by four against three that restitutionary claims were generally liable to be met with a change-of-position defence. It is noteworthy that, whereas all previous cases were concerned with mistaken payments, this case did not involve such a mistake, but was about money paid involuntarily under a statute which was subsequently held unconstitutional. For this reason, the decision has an all-encompassing implication for the law of unjustified enrichment, for whether the benefit claimed came into the hands of the defendant by mistake or otherwise, the difference is not a material one as long as there was no valid ground for the 'transfer'. In reaching its decision the court held:

'Such a claim is undoubtedly equitable and depends upon broad considerations of equity and justice (...). Generally, courts will look to see if a benefit has been conferred on the defendant, under a mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change-of-position by the defendant and whether the defendant's conduct was tortious or fraudulent'.

Thereafter the court adds:

'Generally, if the plaintiff's conduct will lead to an undue net loss to a defendant by reason of a changed position, as will often be the case where funds are disbursed then, the parties being equally innocent, recovery may be denied'.

The current position can still be said to be based on Keener's doctrine that 'the principle that forbids the defendant from enriching himself at the expense of the plaintiff should clearly forbid the plaintiff indemnifying himself against loss at the expense of an innocent and blameless defendant'. Hence, we still read in modern cases such as *Monroe Financial Corp v DiSilvestro*,<sup>315</sup> and *Westamerica Securities, Inc v Cornelius*<sup>316</sup> that 'the

<sup>313</sup> For a more detailed discussion of these phases, especially in New York, see generally R.J. Sutton in J.B. Elkind (ed.) *Impact of American Law on English and Commonwealth Law* (1978) 166.

<sup>314</sup> 285 NE 2d 695, 334 NYS 2d 388 (1972). The Court decided the case on 4 -3 majority.

<sup>315</sup> 529 NE 2d 379 (Ind. Ct App. 1<sup>st</sup> Dist. 1988).

<sup>316</sup> 520 P 2d 1262 (1974). *Pilot Life Insurance Co. v Cudd*, 36 SE 2d 860, 863 (SC 1945) which held that the general rule that when money is paid to another under circumstances of mistake of fact it may be recovered as long as there has not been a change in the payee's position such that the refund would be unjust.

rule that money paid under a mistake of fact<sup>317</sup> may be recovered back<sup>318</sup> does not apply where the payment has caused such a change-of-position of the other party that it would be unjust to require him or her to refund the payment or the recipient cannot be restored to the status quo'. Obviously, such principle has over time been refined<sup>319</sup> and its scope limited in some circumstances, but its main idea still permeates the case law on the issue. As Keener's earlier work<sup>320</sup> demonstrated, there is a profound relationship between the change-of-circumstances defence and the restitutionary doctrines he was concerned to expound, which has now culminated in the almost 'unified' principle of unjustified enrichment.

Apart from the general elements above mentioned, current American law calls for further requisites that must be established before a defendant can have the benefit of the defence of changed circumstances. Such elements are usually termed as 'detrimental reliance',<sup>321</sup>

<sup>317</sup> As to mistakes of fact and mistakes of law there is still no unanimity in the cases, for some still insist that only mistakes of fact qualify to sustain an action for recovery while others make no difference of mistakes of fact and law. In an older Tennessee case, the issue was put this way: 'A payment of money under mistake of law may be recovered where it would be unconscionable for the party who obtains the advantage in such a transaction to retain it, but although there was a clear mistake of law, yet if the party benefited he may retain the advantage in good conscience; neither a court of law nor of equity will give relief' (*Leach v Cowan* 125 Tenn 182; 140 SW 1070 (1911)); in New York and Ohio the distinction was abandoned as early as 1936 and 1957 respectively in *Rosenblum v Manufacturers Trust Co* 270 NY 809, 200 NE 587, 105 ALR 947 (1936) and *Botzum Bros Co v Brown Lumber Co* 104 Ohio App. 507, 150 NE 2d 485 (1957). It is also to be noted that in American law in general, a mistake as to foreign law is regarded as mistake of fact, and ordinarily the rules governing such mistakes (in those jurisdictions that still maintain the difference) apply (see generally *American Jurisprudence* 2d, Equity § 20; and 66 *American Jurisprudence* 2d, Restitution and Implied Contracts §§ 134ss and § 154).

The drafters of the Restatement (Third) of Restitution recommend however that the distinction between mistake of law and of fact be abolished altogether, and they suggest that the unjustness of the enrichment is the critical factor in determining whether restitution is appropriate, and not whether the mistake was of fact or law (*Restatement (Third) of Restitution and Unjust Enrichment* § 5f (Discussion Draft 2000); § 5f (Tentative Draft No. 1 2001)).

<sup>318</sup> 66 *American Jurisprudence* § 134 (2001).

<sup>319</sup> For the initial refinements see the various comments in the *Restatement of Restitution* (1937) to par. 142(1) 'The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution'.

<sup>320</sup> *A Treatise on the Law of Quasi-Contracts*, first published in 1893.

<sup>321</sup> 'To assert a valid defence to [plaintiff's] mistaken payment of money had and received cause of action, [the defendant] must demonstrate detrimental reliance on the subject payment' (*Manufacturers Hanover Trust Co v Chemical Bank* 559 NYS 2d 704, 710 (App. Div 1990)).

‘irrevocability and materiality of the change’, and ‘causal connection’.<sup>322</sup> Thus in *Jonklaas v Silverman*<sup>323</sup> the court held that ‘in order that there may be such a change-of-position as will defeat an action to recover money paid by mistake, the change must be detrimental to the payee, material and irrevocable and the change of position must have been caused by the payment in question’.<sup>324</sup> The reliance element can be found in circumstances such as where a defendant who received a payment by mistake, believing that he is entitled to retain it, surrenders collateral security for a debt or suffers a loss of rights and remedies against others who could have been required to make payment, so that he cannot be placed in status quo.<sup>325</sup> It is to be noted however that in such circumstances the right or the collateral security surrendered must have been of value, for where the collateral is worthless or, as in the case of release of the lien, as an example of a surrendered a right, if such a lien be void, the loss of the collateral or the release of the lien does not constitute a detrimental reliance.<sup>326</sup> A change-of-position is not considered detrimental and therefore constitutes no defence if it can be reversed or the status quo can be restored without expenses.<sup>327</sup> Where, for example, the defendant incurred new debts or extraordinary living expenses in good faith reliance upon the right to an overpayment, and can establish such a fact by proving that but for the mistaken overpayment, he would not have incurred these costs and liabilities, there is a detrimental reliance, and the change of position deriving from such reliance constitutes a defence precluding the claimant’s right to relief.

<sup>322</sup> The test of causal link, although not always expressed in the cases, is obviously, a ‘but for’ test. See for example in England where the judge in *Scottish Equitable Plc v Derby* [2000] 3 All ER 793 said that ‘had Mr. Derby not received the overpayment, he would not have taken any steps (or abstained from taking any steps)’.

<sup>323</sup> *Jonklaas v Silverman* 117 RI 691; 370 A 2d 1277 (1977).

<sup>324</sup> 66 *American Jurisprudence* 2d §§ 151-153 (2002).

<sup>325</sup> *Jefferson County v McGrath’s Executor* 205 Ky 484, 266 SW 29, 41 ALR 586 (1924); *Monroe Financial Corp v DiSilverio* 529 NE 2d 379 (Ind. Ct App 1<sup>st</sup> Dist. 1988), *PaineWebber Inc v Levy* 293 NJ Super 325, 680 A. 2d 798 (1995).

<sup>326</sup> *National Shawmut Bank of Boston v Fidelity Mutual Life Insurance* 61 NE 2d 18, 159 ALR 478 (1945).

<sup>327</sup> *First National City Bank v McManus* 29 NC App. 65, 223 SE 2d 554 (1976).

Because change-of-position is an affirmative defence,<sup>328</sup> the party invoking it also bears the onus of proof in the proceedings. That is so because by virtue of the defendant avowing the truth of the averment of the facts in the plea, either expressly or by implication, but thereafter proceeding to allege new matter that will deprive the facts so admitted of their ordinary legal effect, the defendant will thereby effectively neutralise or obviate and destroy the cause of action and defeat recovery.<sup>329</sup> The general rationale of the affirmative defences when applied specifically in the law of unjustified enrichment leads one to conclude with Andrew Kull that 'defences to restitution are conceptually coherent where the requirements of an affirmative defence, if made out by the defendant, tend logically to refute the claim that he has been unjustly enriched'.<sup>330</sup>

For these reasons, the law places the burden upon the defendant to establish the defence. Generally the proof offered to establish the defence must be certain with nothing left to mere inference. This, however, does not mean that the elements required to establish the defence have to amount to a beyond-reasonable-doubt standard, but it simply means that the proof of the elements required must generally be clear, and there is no need for more than a fair preponderance of the evidence.<sup>331</sup> The evidence must nevertheless establish that the change has been detrimental to the defendant, and that it was material and irrevocable, such that the defendant cannot be returned to the status quo.

### 2.5.2. *Estoppel and Waiver.*

<sup>328</sup> An affirmative defence rests on matters outside the scope of the plaintiff's prima facie case. If a defence negates an element of the plaintiff's prima facie case, it is not considered as an affirmative defence. (61A *American Jurisprudence* 2d 'pleadings' § 355ss). American law distinguishes between 'listed affirmative defences' and 'non-listed affirmative defence'. Substantively the distinction is of little importance. But it is so for procedural reasons, for a listed affirmative defence must be pled, if not the defence is waived. For this reason, *Sanden v Mayo Clinic* 495F 2d 221 (8<sup>th</sup> circ. 1974) clarified that 'because an affirmative defence raises a matter extrinsic to the plaintiff's claim/case, even a matter listed in Federal Rules Civil Procedure (Rule (8c)) is not an affirmative defence if it merely negates an element of the plaintiff's prima facie case.

<sup>329</sup> *Oyler v Oyler* 293 SC 4, 358 SE 2d (Ct. App 1987); 61A *American Jurisprudence* 2d § 298 (2002).

<sup>330</sup> A. Kull (1995) 83 *California L R* 1191, 1234

<sup>331</sup> 66 *American Jurisprudence* § 151.

Estoppel and waiver<sup>332</sup> constitutes another pair of American defences to enrichment claims. Like in all other jurisdictions, estoppel is not peculiar to enrichment law; it can be raised in any field of private law. The defence is premised on representation, express or implied from the situation, which leads the recipient relying on it to change his position to his detriment. Closely parallel to estoppel is the doctrine that a known right can be lost by its waiver, or intentional relinquishment, and the intention to waive can be implied from the conduct. The conceptual difference between estoppel and waiver, in so far as they relate to defences to restitution, is explained as follows:

‘when a claimant is defeated by reason of estoppel it is because he has been ‘estopped’ from claiming another’s enrichment as unjust because it is he, himself, who by words or conduct has caused the other to act to his detriment; when, on the other hand, the defence is based on waiver, the thinking is more that it is the policy favouring the stability of transactions, of requiring that ‘commitments seriously assumed are to be honoured,’ that stands in the way of his claim’.<sup>333</sup>

Mere negligence on the part of the mistaken payer of money is not of itself a bar to restitution if the recipient has not changed his position, but a wilful neglect to investigate the facts before making payment can, in a strong enough case, be so blatant as to stop the payer from asserting his mistake. After discovery of the mistake, if the payer fails promptly to notify the recipient of the mistake, and this result in prejudice to the latter, there is an overlap between change-of-position and estoppel as a defence.<sup>334</sup> There is also the so-called ‘estoppel against estoppel’ whereby a party is precluded by counter estoppel from asserting an estoppel; and where he is so precluded, the matter in issue is to be determined and disposed of otherwise than by application of the doctrine of estoppel.<sup>335</sup>

<sup>332</sup> Waiver is comprehensively defined as a voluntary and intentional relinquishment, surrender, or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such a waiver the party would have enjoyed. Ordinarily a waiver occurs or exists when one dispenses with the performance of something he is entitled to exact, or when in possession of any right, whether conferred by law or by contract, with full knowledge of the material facts, does or forebears to do something the doing of which is inconsistent with the right or his intention to rely upon it. (1996) 31 *Corpus Juris Secundum* § 67.

<sup>333</sup> G. Douthwaite, *Attorneys’ Guide to Restitution* (1977) 374-375.

<sup>334</sup> *Firestone Tire & Rubber Co v Central National Bank of Cleveland* 112 NE 2d 636 (1953).

<sup>335</sup> (1996) 31 *Corpus Juris Secundum* § 65. Where an estoppel exists against an estoppel, the matter is set at large, or is left as if neither estoppel had been offered; the two estoppels destroy each other and the interest of justice requires that both parties be liberated therefrom.



In sum, although in the American context most of the estoppel and waiver cases are frequently applicable where derivative suits are brought against stockholders, and where a beneficiary seeks restitutionary relief against a fiduciary, there is no reason why both defences should not be raised to any claim where restitution is sought.<sup>336</sup>

### 2.5.3. *Good Faith Purchase for Value without Notice.*

What is said above about Canadian law on the defence of ‘good faith purchase for value’ mostly applies *mutatis mutandi* to American law. The defence is commonly called the *bf*p (*bona fide* purchaser) doctrine, and it is often invoked in bills of exchange matters and other commercial settings. Its complexity is considerable where commercial intangibles are concerned, such as negotiable instruments, stocks and bonds, documents of title, and the like. Within these commercial intangibles the results of the application of the *bf*p tend to be challenged.<sup>337</sup> Its importance in these commercial matters is so great that at some point it might have seemed as if it were an expression of capitalist ideology itself. However, there has always been an attempt to balance the *bf*p doctrine with the preservation of property rights. For example, in 1874 in *First National Bank of Toledo v Show*,<sup>338</sup> the then New York Commission of Appeals (the highest court in the state in those days) held, *inter alia*, that ‘[w]hile commercial convenience must be respected, the rights of property must not be sacrificed’ and added: ‘The true interest of commerce demands that the claims under bills of lading and other such instruments should be scrupulously protected, since commerce will not flourish where the rights of property are not protected’.

<sup>336</sup> G. Douthwaite, *Attorneys’ Guide to Restitution* (1977) 375.

<sup>337</sup> See for example the challenges advanced to a famous case *Banque Worms v BankAmerica International* 77 NY 2d 362, 568 NYS 2d 451 570 NE 189 (1991) where the intricacies of the doctrine surfaced. The defence there was called ‘discharge for value rule’, but the court made it clear with reference to the Restatement of Restitution (Second –which was never approved), section 14 (1) comment a) that the discharge for value rule was simply a ‘specific application of the underlying principle of *bona fide* purchase’ set forth in section 13 of the Restatement of Restitution.

<sup>338</sup> 61 NY 283, 304 (1874).

Grant Gilmore<sup>339</sup> describes the same philosophy of commercial convenience thus:

‘The triumph of the good faith purchaser has been one of the most dramatic episodes in our legal history. In his several guises, he serves a commercial function: he is protected not because of his praiseworthy character, but to the end that commercial transactions may be engaged in without elaborate investigation of property rights and in reliance on the possession of property by one who offers it for sale or to secure a loan’.<sup>340</sup>

An ‘innocent purchaser’ is one who had no reasonable basis to suspect the seller did not have good title. The most significant impact of the bfp doctrine, as a defence to an enrichment claim, arises when one is seeking to assert a right of ‘equitable’ origins against a third party who has acquired legal title. To establish the defence of *bona fide* purchase it must be shown that the defendant has given value, in good faith, for the subject matter which the plaintiff claims; and, ordinarily, that he was without knowledge, actual or constructive, of such a claim at the time he acquired title.<sup>341</sup> For our purposes the analogy and the relationship with change-of-position is that once a *bona fide* purchaser for value is accorded the right to hold title, he is secure in what he has, and the plaintiff cannot lay claim on him. Put differently, what is at issue here is competing ‘equities’ if not interests. Both the claimant and the defendant have ‘title’, so to say, to the subject matter; but in such cases the best title is with the defendant, and therefore he must prevail in any claim for restitution. The apparent windfall he acquires is fully justified because he ‘paid’ for it.<sup>342</sup>

<sup>339</sup> G. Gilmore (1954) 63 *Yale L J* 1057.

<sup>340</sup> (1954) 63 *Yale L J* 1057, 1058 footnote 3.

<sup>341</sup> *Lake City Corp v Michigan Avenue National Bank of Chicago* 337 NE 2d 251 (1975); 76 *American Jurisprudence* 2d, Trusts, § 269 et seq; G. Douthwaite, *Attorneys’ Guide to Restitution* (1977) 389.

<sup>342</sup> Of course civil-law countries might have a problem with this conclusion, for taken to the maximum, a ‘thief’ can pass title, even though he did not have one. Grant Gilmore illustrates this scenarios in the context of American law with reference to the 19<sup>th</sup> centuries Factor’s Acts, whereby the courts subsequently developed the so-called ‘concept of voidable title’ and the new ways of shifting the distribution of risks: ‘If B buys goods from A, he gets A’s title and can transfer it to any subsequent purchaser; if B steals goods from A, he gets no title and can transfer none to any subsequent purchaser, no matter how clear the purchaser’s good faith. ‘Voidable title’ in B came in as an intermediate term between the two extremes: If B gets possession of A’s goods by fraud, even though he has no right to retain them against A, he does have the right to transfer title to a good faith purchaser’. Most of this doctrine with some little variations is now embodied in the Uniform Commercial Code.

#### 2.5.4. *Laches and Statutes of Limitations.*

As it was mentioned in the introductory remarks on this section, American law treats the issue of limitation (prescription) defence alongside laches, although laches are also treated alongside estoppel for particular reasons. While the limitation defence sprang generally from the common law, laches developed exclusively in equity, and courts of equity did not regard themselves bound by statutes of limitations.<sup>343</sup> However, the courts of law and equity have now been merged in nearly all US States and the continuation of two 'limitation' regimes has come under pressure. Laches is a defence that is raised due to the plaintiff's length of delay in bringing the suit that could be inequitable where it results in detriment to the defendant, although in extreme cases even the showing of prejudice can be ignored.<sup>344</sup> The real importance of these two defences is, inter alia, to be found in the burden of proof. There is a proposition to the effect that where the plaintiff has delayed in bringing the claim for a period longer than what the period spelled out in the analogous statute of limitations,<sup>345</sup> the burden is on him to persuade the court that he should qualify for relief notwithstanding; whereas if the delay is shorter than the statute of limitations, the burden of proof is on the defendant to show the delay was unreasonable and prejudicial to him.

Although there is an interface between estoppel, waiver, laches and change of position, in practice most cases restrict laches where equitable relief in its usual form is being sought. As to prescription itself, which is mostly regulated by statutes, the main problem is to determine from which date time begins to run in the context of unjustified enrichment. Thus far there is no unanimity among academic writers or in the courts and the questions that were raised in the introductory remark may still need further investigation.

<sup>343</sup> G. Douthwaite, *Attorneys' Guide to Restitution* (1977) 378-379; L. M. Burson (1999) *Loyola of Los Angeles L R* 799; 31 *Corpus Juris Secundum* § 66 (1996).

<sup>344</sup> See for example *Rockshire Civic Association inc v Mayor & City Council of Rockville* 358 A. 2d (1976) (Md App.). In this case for example, the delay in bringing the suit was nine and half years. However, the plaintiffs were appealing an administrative zoning decision, normally to be done within 30 days. The court held that 'under these circumstances, and considering the magnitude of the delay, a separate showing of prejudice is not required'; G. Douthwaite, *Attorneys' Guide to Restitution* (1977) 379.

<sup>345</sup> G. Douthwaite, *Attorneys' Guide to Restitution* (1977) 380.

#### 2.5.4. *Election of Remedies and Res Judicata in American Law.*

Here, as in the defences discussed under the previous heading, American courts face similar situations to those described in the Canadian law above.<sup>346</sup>

Modern American law on pleadings allows demands for alternative relief very freely, and pleadings can be readily amended. For that reason, modern courts do not favour election of remedies as a defence unless either the plaintiff's conduct has resulted in prejudicial reliance of some sort by the defendant; or the *res judicata* doctrine calls for such a result; or where not to hold the plaintiff as having made a conclusive election might tend to facilitate a double recovery. Pursuit of an unavailable inconsistent remedy will not bar the pursuit of a viable remedy unless there was detrimental reliance on the part of the defendant.<sup>347</sup> Obviously, where the exceptions just mentioned are met, the claim will be barred and as a consequence whatever windfall the defendant has acquired will lie where it is. Though the outcome might seem unjust, it can be legally justifiable that the plaintiff should bear such a loss, if any, where he has taken the risk upon himself. The final result is therefore analogous to the change-of-position defence, whereby the plaintiff is denied recovery due to an extrinsic element of the claim.

#### 2.5.5. *Concluding Remarks.*

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<sup>346</sup> See item 2.4.4 ('*Res Judicata* in Canada') above. Some of the issues in American law arise analogously in the contexts of rescission where there might be an interrelation with a damages claim. The problem in those cases is sometimes procedural because one of the litigants has made an election to disaffirm, say, a contract for fraud. It is said that courts have become flexible and today they do permit, for example, 'reliance damages' along with a decree of 'rescission'. Sometimes it had been held that the bar to institute the other claim is not sustained because what is at issue is a choice between substantive rights and a mere choice of remedy. A clear example in this regard is *Schlotthauer v Krenzelok* 79 NW 2d 76 (1956). In this case, at some point the judge held that 'the reason why a suit at law to recover damages for fraud bars subsequent suit for rescission is not because there has been an election of inconsistent remedies, but rather that the act of instituting an action at law for damages recognises the existence of the contract and affirms it. Such action is no different than any other act indicating an affirmation of the contract, such as proceeding with the performance of the contract after discovery of the fraud, or disposing some of the property acquired under the contract, thus putting it beyond the power of the defrauded party to rescind and place the parties in *status quo*'.

<sup>347</sup> *Bank Building & Equipment Corp. of America v Georgia State Bank* 209 SE 2d 82 (1974).

In one way or another, it is obvious that in American law all defences discussed above, if successfully raised, tend to converge at least in the outcome with a feature of a change-of-position defence; i.e., to leave the loss where it falls based essentially on an extrinsic element to the claim itself. Although none of them is able to achieve a partial restitution, the success of any of them depends, *inter alia*, on there being some reasonableness, a rationale for the denial of the claim, and to some extent some equitable and policy considerations.

## 2.6. Loss of Enrichment and other Enrichment Defences in South African Law.

### 2.6.1. *Introductory Remarks.*

As there is no general enrichment action in South African law, one would also think that there is no express ‘general defence’ to enrichment claims. Inasmuch the elements of each *condictio* are different, so different defences will also attach to each claim. However, this is not the case and, even though the South African law of unjustified enrichment remains fractured, a number of defences have come to be recognised as applying across all, or many, enrichment actions. One of the defences – and also the most important one – is the ‘loss of enrichment’.

Despite the scarcity of systematic studies of enrichment defences in South African law, some generalizations can be attempted in regard to this defence. First, a difference must be made between cases where the recovery of the benefit being sought is the product of a one-sided performance by the plaintiff and those cases where both parties have performed under a bilateral transaction that has failed (e.g. as a result of supervening impossibility) such as to give both parties a cause of action in unjustified enrichment, or a cause of action in contract that resembles an enrichment and in other countries is recognised as

such (e.g. where a contract fails due to it having been rescinded as a result of say, misrepresentation).

In the first group of cases, the claim may, or may not, be met by a defence raised by the defendant, but when it is met by a defence, the possibility of a complete bar to recovery may arise should there be an alteration in the defendant's position. In the second group of cases,<sup>348</sup> it seems that as a matter of principle, one party can recover what he conferred only if he can restore the benefit that he received. It is a contentious issue classifying the winding up the consequences of 'frustrated contracts' utilizing the unjustified enrichment doctrine, because it appears that such approach is prone to inevitably bringing with it the availability of the change-of-position defence to a 'contracting party', thereby subverting bargains. But it is also clear that not all cases fall into the 'subverting bargains' rationale. Therefore the unjustified enrichment doctrine seems an equally appropriate avenue for winding up of such cases. And if the rules of unjustified enrichment apply to such cases, the 'value remaining' as the measure of enrichment once again comes into play.

The outcome of both approaches above appears to lead to a dilemma: contract rules may not solve adequately the effects of some failed bilateral agreements and the application of enrichment rules may subvert the bargain with the application of change of position defence. Faced with this impasse one needs to find an exit door to the dilemma. The probable avenues would seem to be the following: either (i) declare that the model of winding up the consequences of failed contracts within the unjustified enrichment doctrine as being not valid at all, for few would contest the correctness of the assertion that there can be no claim in unjustified enrichment unless the claimant shows that he was not otherwise obliged to confer the benefit in question, or (ii) if the model is valid, as some cases seem to confirm - and in appropriate circumstances the 'value remaining' cannot represent the measure of liability in unjustified enrichment - then a dual measure of liability must be sanctioned, or (iii) alternatively, a concession must be made that the

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<sup>348</sup> This group of cases is the subject matter of chapter three below.

defence of change of position is not applicable to these cases, thereby acknowledging an important exception in the application of the defence.

In this respect Daniel Visser<sup>349</sup> while briefly dealing with the point of ‘Measuring enrichment: Value received versus value remaining’ says that ‘however strongly the change-of-position (defence) is embedded in a legal system, there are cases where the value received is the appropriate measure’. By way of example he cites the cases of failed reciprocal contracts in which he is of the view that it would be inequitable if one of the contracting parties could rely on change of position due to an inability to return what he had received. Secondly, it would also appear that some of the defences in unjustified enrichment apply to some extent to all *condictiones* regardless how they are categorised, while others may only apply to specific *condictiones*. For example, the assertion in *Govender v Standard Bank of SA Ltd*<sup>350</sup> that ‘[i]t is a defence to the *condictio indebiti* that the mistake was not reasonable but negligent, but it would not seem to be a defence to the *condictio sine causa* since no error need to be proved, whether reasonable or unreasonable’,<sup>351</sup> illustrates the fact of there being defences that only apply to certain *condictiones*. Loss of enrichment, on the other hand, is a defence that in principle applies to all *condictiones*, because it is an ‘affirmative’ defence and it is not dependent on the elements of the claim *per se*, but it is advanced on ‘facts’ extrinsic to the claim itself. Therefore, whenever a claim is *prima facie* established, and regardless of the *condictio* to which it is attached, if the defendant can show that he is no longer enriched and has lost

<sup>349</sup> D. P. Visser ‘Unjustified in Comparative Perspective’ in M. Reimann & R. Zimmermann (ed.) *The Oxford Handbook of Comparative Law* (2006) 970, 992 (Chapter 30); D. P. Visser ‘Unjustified Enrichment’ in J. M. Smits (ed.) *Elgar Encyclopaedia of Comparative Law* (2006) 779.

<sup>350</sup> (1984) 4 392 (C) 400F-G.

<sup>351</sup> See also *FirstRand Bank Ltd v ABSA Bank Ltd* (2001) 1 All SA 92 W at 101E-F. In the light of *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd* (1997) 2 SA 35 (A) the reasonable or unreasonable mistake issue may have become irrelevant, but for our purpose the assertion is still a useful illustration that shows that the defences to a *condictio sine causa* are not necessarily the same as those to the *condictio indebiti* or other *condictiones*. Indeed, the full passage in *Govender* case clearly so states. It reads: ‘The *condictio sine causa* is brought where plaintiff’s money is in defendant’s hand without cause, there need be no erroneous belief that the money was owing to the defendant, as is the case under the *condictio indebiti*. It is necessary for a *condictio indebiti* to show reasonable mistake of the plaintiff, but a *condictio sine causa* lies whether the money is in the hands of the defendant without cause, whether due to mistake of the plaintiff or not. It is therefore a defence to the *condictio indebiti* that the mistake was not reasonable but negligent, but it would not seem to be a defence to the *condictio sine causa* since no error need to be proved, whether reasonable or unreasonable’.

the enrichment in good faith and in reliance on the receipt of the benefit, save some qualifications, he (the defendant) will be exonerated in full or in part from the liability to restore the benefit so received to the extent he is no longer enriched. As a matter of principle the defendant is obliged to return the enrichment that was received at the plaintiff's expense, but once losses of enrichment have been discounted in favour of the defendant, the claim can rightly be said to be for value surviving. Hence we read in *LAWSA*<sup>352</sup> (§§ 207-244) in the context of the *condictio indebiti* (§ 211) that 'where the defendant has lost or disposed of the thing, his liability is likewise restricted to the amount by which he is still enriched at the time of the action, subject to the exceptions set out in paragraph § 213 above', i.e, the defendant must not be at fault at all<sup>353</sup> and if the defendant is in *mora*, the rule *mora debitoris perpetuat obligationem* applies, that is to say, from that moment the 'defendant's liability is reduced or extinguished only if he is able to prove that the event which diminished or extinguished his enrichment would also have operated against the plaintiff if performance had been made'.<sup>354</sup> The same is held to apply *mutatis mutandi* to all other *condictiones*, subject to the same caveats as those provided for in the *condictio indebiti*. So at § 211 in *LAWSA* it is clearly said that 'as the *condictio causa data causa non secuta* is an enrichment action, non-enrichment is a good defence', subject to the same qualifications referred to above (§ 217). The same applies also for the *condictio sine causa* at § 219. In the limited circumstances in which the

<sup>352</sup> Law of South Africa: *Enrichment* Vol.9 2<sup>nd</sup> Edition (2005) by J.G. Lotz (Revised by F. D. J. Brand).

<sup>353</sup> The full text of the qualifications reads as follows: '(i) From the moment that the defendant becomes aware that he has been enriched sine causa at the expense of another, his liability is reduced or extinguished only if he is able to prove that the diminution or loss of his enrichment was not due to his fault; (ii) If the defendant should have allowed for the possibility that the benefit received might later prove to constitute an unjustified enrichment, his liability is again reduced or extinguished only if he can prove that the diminution or loss of the enrichment was not due to his fault; (iii) from the moment the defendant is in *mora* the rule *mora debitoris perpetuat obligationem* applies. From that moment his liability is reduced or extinguished only if he is able to prove that the event which diminished or extinguished his enrichment would also have operated against the plaintiff if performance had been made'.

<sup>354</sup> See similar wordings to this caveat in the Quebec Civil Code art 1050 which reads: ' (i) If the thing unduly received be a thing certain, he who has received it is bound to restore its value, if through his fault and bad faith it has perished or deteriorated, or can no longer be delivered in kind'; (ii) if he has received the thing in bad faith, or after being put in default retain it in bad faith, he is answerable for its loss by a fortuitous event, *unless the thing would have equally perished or deteriorated in the possession of the owner*' (emphasis added).



*negotiorum gestio* action is considered as enrichment action,<sup>355</sup> non-enrichment also constitutes a good defence (§ 222).

The *condictio ob turpem vel injustam causam*, which will be dealt with in more detail in a separate heading, presents an exception to the general application of the defence of loss of enrichment. In the case of this *condictio* South African law has opted for a flexible approach epitomised by *Jajbhay v Cassim*,<sup>356</sup> but there are still some that doubt the soundness of the approach adopted in that case.<sup>357</sup> For present purposes it is enough to say that the defendant may defeat a claim based on such *condictio* on the ground that he is not in *pari delicto* with the plaintiff. As the law currently stands, in regard to the extent of the defendant's liability, the approach advanced by Voet, *Comentarius* 12.5.1 is still followed,<sup>358</sup> i.e., the recipient remains liable for the full value of the thing received even where the object has been lost or destroyed because the action falls within the '*ex quodam quasi maleficio descendat*' reasoning, or the modernised reasoning as expressed in *Minister van Justice v Van Heerden*<sup>359</sup> case that the recipient remains liable because a *turpis* person is always in *mora*.

It also seems that the obligation to restore unjustified enrichment in principle encompasses the extent to which the defendant was enriched, not only by retention of the principal thing, but also of the fruits of that thing, whether those fruits have been consumed or not.<sup>360</sup> 'Fruits' as a concept encompasses both interest on money<sup>361</sup> (civil

<sup>355</sup> *Negotiorum gestio* was discussed in details in chapter 1 of this study. The following are however the circumstances in which in South African law *negotiorum gestio* gives rise to an enrichment action: (i) where the *gestor* has administered the affairs of a minor; (ii) where he has *mala fide* administered the affairs of another for his own account and not that of the *dominus*; (iii) where he has administered the affairs of another in the bona fides belief that they were his own; (iv) where he has administered the affairs of another against the express consent of the *dominus*. (see LAWSA § 222-223).

<sup>356</sup> (1939 AD 537).

<sup>357</sup> See LAWSA § 214.

<sup>358</sup> See for example *Minister van Justice v Van Heerden* 1960 (4) SA 377 (O).

<sup>359</sup> 1960 (4) SA 377 (O).

<sup>360</sup> For a detailed historical study on the issue of fruits in Roman law and the *ius commune* see J. Hallebeek, *The Concept of Unjust Enrichment in Late Scholasticism* (1996) 67-73.

<sup>361</sup> The issue of interest in unjustified enrichment is really a matter of debate. There is no clear cut position on the issue yet. Unlike in common law countries where enrichment claims are both seen as encompassing rights in *personam* and rights in *rem*, South African law, like other civilian law countries does not adhere to that proposition. Claims in unjustified enrichment law are in *personam* only and for that reason the foundations of claiming interest, say on money mistakenly paid, may be very shaky. If one asserts that

fruits) and natural fruits, in response to a claim for restitution of benefits and the defence of loss of enrichment applies both in respect of the principal thing and the fruits. For example, a defendant who has consumed the fruits in good faith may claim that he has changed his position by the mere fact of consumption. However, the questions whether, and the extent to which, the position of the defendant has been changed by consumption, are issues of fact.

The demarcation of enrichment claim itself in this area is still nebulous in South African law. The question of who is entitled to fruits is especially relevant in cases of possessors and occupiers. This problem brings with it the inevitable interaction of property concepts with unjustified enrichment concepts, and ultimately raises the question whether the issue of civil fruits (such as interest) is the exclusive preserve of property law or it is amenable to be treated within the enrichment doctrine. In this regard, it is always asked whether the party that generated the fruits was in the position of a *bona fide* possessor or that of a *mala fide* possessor; or a *bona fide* occupier or *mala fide* occupier; or even whether he was an usufructuary whose right is subject to a personal *servitude* of usufruct or as a person with a servitude of use.<sup>362</sup> For example, it is accepted that if ‘the possessor or the occupier happens to have an enrichment claim against the owner on the basis of

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interest is recoverable, say on mistaken payments, this very fact may reveal that the legal system may subtly viewing the nature of the claim with some interface with proprietary claim, viz, the claim may be treated as though the plaintiff were recovering his own property, a nuanced *rei-vindicatio* in disguise. Alternatively, the plaintiff may be seen as suing for a debt, but this would introduce a contractual nuance to the claim. If the claim could be viewed with vindicatory nuances, the analogy would be made to the loss of interest the payer would have made by investing the amount mistakenly paid to the recipient. But we know that an unjustified enrichment claim is personal in nature, and as such interest is not normally recoverable, because if it were otherwise, specially where mistaken payments are at issue, such claim would amount to claiming damages; but damages are only maintainable in delictual or contractual actions, or proprietary claims as already mentioned. A further hurdle is that a claim for mistakenly paid money, for example, is for the return of the precise amount ‘mistakenly’ paid; as there is no question of fault on the part of the recipient, unless special circumstances have occurred, there is also no theoretical basis why interest should be allowed on such a sum. See however a different line of development in American law expressed in some cases such as *Ball v County of Los Angeles* (1978) 82 Cal. App. 3d 313; *McDonald Corp v RL Moore* (1965) 237 Fed. Supp 874 (S.C.A.) and *Alexander Hamilton Life Insurance Co. of America v Lewis* (1977) 550 SW 2d. (Ky) all of them suggesting that interest may be payable by the defendant, at the discretion of the court, at least as from the time when the defendant had notice of, or could have discovered the extent of his obligation. Perhaps in our law if one were to follow this American suggestion it could be developed basing it on some extension by analogy to the proposition that from the time the defendant is put in *mora* the rule *mora debitoris perpetuat obligationem* applies.

<sup>362</sup> D. P. Visser, *Unjustified Enrichment* (2008) 664-667. Visser presents a detailed discussion of the issue and refers to the conflicting views still prevailing in this area in the South African legal literature.

necessary or useful improvements, the value of the fruits acquired (minus production costs) is set off against this claim'. In Visser's view this is a 'back-door way of acknowledging that the possessor or the occupier was enriched by acquiring the fruit'.<sup>363</sup> In effect this also means that the matter is amenable to be treated under unjustified enrichment law.

On the one hand, where the party in question is a possessor or an occupier and as such he acquires fruits in terms of the rules governing the *ius fruendi*, then he is considered as being in the position of a '*suum recepit*' and is not enriched by having acquired the fruits.<sup>364</sup> On the other hand, however, where a person has *servitude* of use, his position is said to be similar to some extent to that of a *usufructuary*.<sup>365</sup> But significant differences are acknowledged in so far as the right to take fruits is concerned. In essence, the position is that if the holder of a *servitude* of use takes more than the fruits to which he was entitled, the owner will have the same remedies available as when a *mala fide* possessor has taken fruits.<sup>366</sup> If however he does not take any excess, the right to take fruits which is inherent in his position as usufructuary allows him to cover his daily needs as well as those of his household. The main thrust of the issue is then encapsulated in the rules governing *ius fruendi*.

Prescription may also constitute a defence in unjustified enrichment.<sup>367</sup> Although it can be pleaded in the alternative, it is unlikely to overlap with loss of enrichment. In any event, the institution of Prescription in South African law is regulated by the prescription Act of 1969. Any claim or right alleged to have been prescribed is in principle catered for by this Act. Obviously, debts can arise from several sources, but the Prescription Act draws no distinction based on the source of the debt. It refers in general to debts and it would seem that such general reference encompasses both debts arising in private law as well as those arising in administrative-law relationships. Because the effect of

<sup>363</sup> D. P. Visser, *Unjustified Enrichment* (2008) 674-678.

<sup>364</sup> D. P. Visser, *Unjustified Enrichment* (2008) 665.

<sup>365</sup> P. J. Badenhorst, J. M. Pienaar & H. Mostert, *Silberberg's The Law of Property* 5<sup>th</sup> Edition (2006) 341; Voet, *Commentarius ad Pandectas* 7.81.4; D. P. Visser, *Unjustified Enrichment* (2008) 677.

<sup>366</sup> D. P. Visser, *Unjustified Enrichment* (2008) 675.

<sup>367</sup> See D. P. Visser, *Unjustified Enrichment* (2008) 752-766.

prescription is to extinguish the debt after the period which applies in respect of that debt,<sup>368</sup> its effect is analogous, to some extent, to the change-of-position defence, though the defences are based on different rationales. After the lapse of the period laid down by the statute there is no debt that can be enforced in any of the ways in which debts can be enforced at law.<sup>369</sup>

It is to be noted, however, that procedurally prescription has to be raised by the defendant, since the court cannot *mero motu* take notice of prescription. Since on one analysis this legal institute falls in the category of payments and other factors extinguishing debts (or other rights), the onus of proof in enrichment claims where this defence is advanced will also fall on the defendant.

Because some of the recognised defences identify the circumstances in which the defendant has the right to defeat, or to diminish the measure of, a claim that would otherwise succeed, there is therefore a broad relationship between a claim and a defence in the South African law of unjustified enrichment. On re-reading the cases, it is also obvious that one can distinguish between defences that depend on the change of circumstances of the defendant and those that do not, or between those that operate to defeat the plaintiff's claim completely and those that need not. For example in *ABSA v De Klerk*<sup>370</sup> the court, dealing with estoppel in a claim to a payment *sine causa*, held, inter alia, that 'an essential element of the defence (estoppel) is that the plaintiff must have made the payment negligently'...as 'I am unable to find negligence on the part of the person of the plaintiff, ... it follows that the defence has not been established'. Thereafter the judge continues: 'Another feature of the defence of estoppel is prejudice. The defendant must show that in relying upon the representation he has changed his position

<sup>368</sup> L. E. Krause 'The History and Nature of Acquisitive Prescription and of Limitation of Actions in Roman-Dutch Law' (1923) *SALJ* 26.

<sup>369</sup> D. J. Joubert, *General Principles of Contract Law* (1989) 305-308.

<sup>370</sup> (1999) 1 SA 861 (W) 865F.

to his detriment'<sup>371</sup>. 'The action of 'payment to another' must have affected the defendant's patrimony by way of reducing it'.<sup>372</sup>

### 2.6.2. *The Contours of Loss of Enrichment in South African Law.*

Though there is meagre jurisprudence on this defence and its scope still ill-defined, there is, however, a leading case, *African Diamond Exporters v Barclays Bank*, addressing some of the fundamental issues and from which one can glean what the remaining questions are and possibly what direction future developments should take.

To start with, the facts of the case were as follows: A South African Company (African Diamond Exporters) engaged in a diamond business deal with a California firm (Antwerp Distributing Co) in October 1972. In the execution of their transaction African Diamond agreed to dispatch a consignment of diamonds and in exchange received a sum in excess of \$188 000 instead of a sum of just \$18 000 as agreed between the parties. The overpayment was due to a mistake made in the London office of Barclays Bank while transmitting a payment from Wales Fargo Bank of Los Angeles to a Johannesburg Branch of *Barclays Bank*. The transfer was initiated by the California firm Antwerp Distributing in payment of the said consignment of diamonds to be received from African Diamond Exporters. Obviously the South African Company noticed the overpayment and made enquiry to establish where the mistake was made, whether it was in London or in California. Kuetsgens, a crooked man heading the Antwerp Distributing branch in California, fraudulently informed African Diamond that the mistake was made in California instead of London, and that the Antwerp account had been debited by Wales Fargo Bank in Los Angeles. Then, the extra sum was accordingly in good faith returned to California and the diamond dispatched. Out of the \$188 000 the sum of \$55 000 was used for a further consignment of Diamonds. Kuetsgens, having received both the diamonds and \$100 000 absconded. Few days later it was discovered that the mistake had

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<sup>371</sup> Ibid. 865G.

<sup>372</sup> Ibid. 865J.

been made in London instead. Therefore the Barclays Branch in London was out of pocket. It sought recovery of the overpayment from African Diamond Exporters through a *condictio indebiti*, but African Diamond raised the defence of loss of enrichment and succeeded in thwarting plaintiff's claim.

In arguing the case, the plaintiff challenged the view that 'in the claim under *condictio indebiti*, the defence of non-enrichment is applicable where the defendant has received fungibles (money being regarded as fungible),<sup>373</sup> as the defendant had contended. To this argument, the court (per Muller JA) unequivocally countered that

'[T]he better and more authoritative view is that, generally speaking, a defence of non-enrichment can be pleaded where money, and other fungibles, have been received *indebite*'.<sup>374</sup>

And thereafter the court reiterated: 'Is the *recipiens* who is a defendant to a claim under the *condictio indebiti* entitled to plead non-enrichment which is attributable to some fault or neglect in his part?' Answering its own question, it concluded that

'A person who receives money or goods, well knowing that what he receives is *indebite*, cannot deal with such goods *quasi rem suam* and will be liable in damages for any loss or deterioration caused by his negligence. However, in view of the particular circumstances of the instant case, I do not think it is necessary to come to a final decision on this aspect of the law. For present purposes I shall assume, without deciding, that that is the correct statement of the law'.<sup>375</sup>

Before coming to such a conclusion however, the court made it clear that there is a fundamental difference between, on the one hand, the legal position of 'a *recipiens* who has resold the property *mala fide* and with the knowledge of the theft [in the original acquisition of the property] and, on the other hand, the *recipiens* who his *bona fide* in the acquisition and resale of the property, i.e., has no knowledge of the theft'.<sup>376</sup> In contrast,

<sup>373</sup> This discussion appears in an earlier case *King v Cohen, Benjamin & Co* 1953 (4) SA 641 (W) at 650-651 and also discussed by professor Scholtens in an article entitled '*Condictio Indebiti* and Unjust Enrichment' in (1954) 71 *SALJ* at 108ff.

<sup>374</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 709C.

<sup>375</sup> *Ibid.* 711H-712A.

<sup>376</sup> *Ibid.* 711F-G. The court here was distinguishing the positions stated in two previous cases namely *Morobane v Bateman* 1918 AD 460 at 465-466 and *John Bell & Co Ltd v Esselen* 1954 (1) SA 147 (A) at 153.

where ‘the acquisition and the re-sale had been *bona fide*, then there would be no liability to make good the value’. That is so, ‘because the good faith of the purchaser would protect him against any claim *ex delicto*, and there would be no contractual relationship and no consideration of natural equity’.<sup>377</sup>

The case raises not only problems of the acceptability of loss of enrichment as a defence in the legal system, but also to what extent the defence is to be made available where fungibles are at issue, and the interaction of good faith and knowledge in parting with the enrichment received. Equally important is the issue of establishing who bears the onus of proof when things acquired *indebiti* are sold or given away *bona fide*. Similar to all other jurisdiction thus far discussed, the case confirms that in South African law loss of enrichment is not available to those who receive goods or money and part therewith in bad faith.<sup>378</sup> The case deals with the loss of enrichment received itself as the facts show, but it does not deal directly with other kinds of losses such as the causally related expenditures or any other losses,<sup>379</sup> nor does it say anything about anticipatory reliance expenditures. The role of negligence in disposing of the enrichment is also not clarified, because the case refers to it in an *obiter dictum* only.<sup>380</sup> I deal with most of these issues below.

In fact, the *African Diamond Exporters* case leaves the loss-of-enrichment defence wide open. Apart from the ordinary circumstances in which it is explicitly acknowledged to be available, the defence should equally be made available where a defendant receives an asset from the plaintiff or receives money which the defendant uses to purchase an asset, and the value of that asset falls. The defence should apply in these circumstances to the extent that the value has fallen. This facet of the defence would ordinarily be catered for

<sup>377</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) at 711A; The same position also appears in *Van der Westhuizen v McDonald & Mondel* 1907 TS 933; and an older authority is Voet *Ad Pandectas* 6.1.10.

<sup>378</sup> *African Diamond Exporters(Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A).

<sup>379</sup> For some aspects of possible future developments in this regard see D. P. Visser (2008) 736-740. Visser addresses briefly, among others, the issue of ‘costs of retaining the enrichment received’, the ‘unsolicited gifts’ problem, the role of negligence, the concept of contributory negligence, etc.

<sup>380</sup> On the role of negligence in this area see the historical position in American law discussed earlier in this chapter at item 2.5.1.

under the ‘disaster version’ as discussed in this thesis. This version of the defence ties in with the thinking in the South African legal system regarding an obligation that has become impossible of fulfillment due to a supervening impossibility for which the defendant is not to blame.<sup>381</sup> The traditional South African common law authorities<sup>382</sup> are unanimous that where there is an absolute or objective impossibility of performance the rule, save exceptions, is that the duty of the debtor to perform either specifically or by means of a surrogate is extinguished.<sup>383</sup>

Additional manifestations of the defence can also be gleaned from the language used in *Morobane v Bateman*,<sup>384</sup> a case that compares the legal position between, on the one hand, the *recipiens* who has resold the property *mala fide* and with knowledge of the theft and, on the other hand, the *recipiens* who is *bona fide* in the acquisition and resale of the property, i.e. has no knowledge of the theft.<sup>385</sup> While the defence cannot be made available in the former situation, undoubtedly it is made available in the latter situation.

Where a ‘recipient knows that what he received is *indebite* but parts therewith without any *mala fides* on his part but in circumstances which shows that some fault or neglect in his part’, it is not very clear whether the defendant can indeed plead the defence of loss of enrichment. All that can be inferred from the South African jurisprudence is that there is a strong presumption the defence might be applicable as hinted *obiter* in the *African Diamond* case. What are the implications of accepting the defence in such circumstances? And if it is not acknowledged, what effect will such an approach have on the legal system as a whole?

One possible implication endorsing the defence in such circumstances is that a slack application of the defence might open the gates of judicial discretionarism, thereby sacrificing the predictability of the remedy of unjustified enrichment. However, it must

<sup>381</sup> Obviously in this context if the claim arises in contract ....

<sup>382</sup> Authorities relevant in this regard would for example be D. 44.7.1.4, De Groot, *Inleidinge* 3.47.1 and Voet, *Commenarius ad Pandectas* 45.1.24.

<sup>383</sup> D. J. Joubert, *General Principles of the Law of Contracts* (1987) 293.

<sup>384</sup> This case is referred to favourably in African diamond case, though it was distinguished for different reasons.

<sup>385</sup> *Morobane v Bateman* 1918 AD 460 at 460-466.



be remembered that loss of enrichment is a 'positive defence' in term of which events occurring 'after the transfer' but which causally lead to the erasure of the enrichment, may cancel out or reduce the liability to restore such an enrichment. Therefore, where an initial liability is established, but the elements of the defence are nevertheless equally sufficiently established, predictability of a remedy need not be accorded so high a priority. That is so because what the law usually requires is a considerable certainty of the initial liability, in the same way that it is more vital that we know and distinguish what is right from what is wrong, than that we be able to predict with absolute precision the monetary consequences of crossing the line. A counter argument to this assertions is that it ignores the fact that any litigant is generally concerned not with liability *per se*, but with its effects. Put differently, litigants usually go to court to get a remedy not necessarily to establish liability. As McInnes put it, 'in areas of strict liability, private law is not a morality play about good or evil; the remedy is the thing'.<sup>386</sup> We must equally remind ourselves that in unjustified enrichment claims fault is irrelevant because the defendant can be held responsible even if he was entirely innocent, and the plaintiff can equally demand relief even if he was wholly responsible for his own error.

In the same way that in unjustified enrichment doctrine it is reasonable to hold that where the ground of liability is established, the remedy that should follow should be the most appropriate one on the facts, rather than a slavish adherence to formalism and to historical categorizations, it is equally reasonable to assume that where the defendant has established all the elements of the defence of loss of enrichment in a situation where he parted with the enrichment without any *mala fides* on his part, but in circumstances which shows some fault or neglect in his part', he (the defendant) should equally succeed on such a defence. His fault or neglect where he acted *bona fide* should not bar him to raise the defence successfully.

Terminologically, the *African Diamond Exporters* case seems to facilitate the maintenance of a problematic nomenclature. It refers to the defence of loss of enrichment

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<sup>386</sup> M. McInnes (2002) *Univ. Toronto L J* 163, 200.

as 'non-enrichment'. This nomenclature is problematic because there may be some confusion between the use of the term 'non-enrichment' and 'loss of enrichment', which is also encountered in other South African legal literature and apparently also in Scottish law. Obviously, in many circumstances where the defence is successfully applied, the situations will coincide and the end result on analysis may lead to the same thing because where the enrichment was lost, there is non-enrichment left, and hence the expression 'non-enrichment is a defence' as *African Diamond Exporters* and others cases as well as *LAWSA* put it. But one must be careful in using these terms interchangeably, because it would appear to me that 'non-enrichment' connotes a negative defence, and 'loss of enrichment' connotes a positive or affirmative defence. That is so because when one asserts that there is 'non-enrichment', the assertion goes to the root of the elements of the claim itself. In this sense there is an opaque interface between a defence *strictu sensu* and factors that cohere to the claim but in respect of which, in special circumstances at least, the onus of proof lies upon the defendant.<sup>387</sup> This is based on the fact that in order to substantiate his claim the plaintiff must establish, *inter alia*, that the defendant was enriched. For him to do this he must prove that it was the defendant who received the benefit in question. Once this has been proven, it creates the presumption of enrichment. And from this moment, the onus of overcoming this presumption falls upon the defendant who in his turn may prove, for example, that he did so on behalf of someone else.<sup>388</sup> Consequently, at one level of the analysis one may reasonably refer to this as a defence of non-enrichment but in reality it concerns facts that are part of the constitution of the claim itself,<sup>389</sup> and not extrinsic to it.

In any event, *African Diamond Exporters* acknowledges that where 'the plaintiff bases his claim for relief on an equitable doctrine the court will be careful so that in the desire to do justice to the plaintiff, an injustice is not done to the defendant.'<sup>390</sup> That being the case, in my view, the decision implicitly acknowledges that a general defence will look beyond the mere loss of the actual enrichment received to encompass all situations that

<sup>387</sup> R. Evans-Jones, *Unjustified Enrichment* (2003) 325.

<sup>388</sup> *Le Riche v Hamman* 1946 AD 648.

<sup>389</sup> R. Evans-Jones, (*supra*) 325.

<sup>390</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A) 713E-F; *Trahair v Webb & Co* 1924 WLD 227 at 235.

might be detrimental to the defendant if he were required to restore all and any enrichment to the plaintiff without consideration of what is happening in his own assets. It is in this wider sense we should understand the judge when he emphasised that ‘for the reasons afore stated it is my opinion that the defendant is not precluded from pleading that, because of what happened, it was in fact not enriched by the over payment received by it’.<sup>391</sup>

### 2.6.3. *Loss of Enrichment versus Change of Position.*

Despite my proposition above that there is a judicial indication that the South African loss of enrichment defence seems wide enough to encompass situations beyond the actual loss of that which was received, it is nonetheless true that the defence has been so far referred to exclusively as ‘loss-of-enrichment’ or ‘non-enrichment’.<sup>392</sup> That being the case, its characteristics might still differ slightly from a full fledged ‘change of position’.<sup>393</sup> Loss of enrichment can succinctly be describe as follows: ‘if at the time of the *litis contestatio* (the date of the commencement of the action) the defendant’s enrichment has been extinguished, he is not obliged to restore anything to the plaintiff; if a portion of the enrichment has fallen away, only the remaining enrichment need be restored’.<sup>394</sup> Change of position, in contrast, is generally described as encompassing not only the loss of the object or benefit received, but also any encumbrances deriving from the changed circumstances. In other words, the concept is related not only to the element enrichment but also to the notion of justice which underlies the law itself.<sup>395</sup> Thus §

<sup>391</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* (1978) 3 SA 699 (A) at 713F.

<sup>392</sup> The nuances of ‘loss of enrichment’ and ‘non-enrichment’ were already discussed above.

<sup>393</sup> Contrast however this discussion with Paul Key’s understanding of the differences ((1995) 58 *Modern Law Review* 505, 507-508). Key refers to three different conceptualisations of change of position, namely (a) a change of position that could be equated with the English ‘equitable estoppel’, (which he himself discounts as inadequate); (b) a change of position that is based on ‘detrimental reliance’, and (c) a change of position that is based upon “losing” the enrichment’. In Key’s view the first two are narrower than the later. Therefore, a defence based on ‘losing the enrichment’ is wider than the one base upon ‘detrimental reliance’. I am not persuaded with his description, because the view can only be true if the word ‘loss’ is stretched, as he indeed does, by describing ‘losing’ enrichment as any detriment the defendant would suffer by being required to make restitution (see particularly p 507).

<sup>394</sup> See R. Zimmerman & D. P. Visser, *Civil Law and Common Law in South Africa* (1996) 526.

<sup>395</sup> P. Key (1995) 58 *Modern Law Review* 505.

142(1) of the American *Restatement of Restitution*<sup>396</sup> puts it this way: ‘the right of a person to restitution from another because of a benefit received is terminated or diminished if, after receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution’.<sup>397</sup> Under this approach the defence is not limited to situations where the benefit (usually money) is spent and there is nothing to show for it. For example, a defendant may rely on change of position defence if it can be demonstrated that he has forgone an income-generating opportunity,<sup>398</sup> or where there is a surrender of a guarantee or a collateral security,<sup>399</sup> say, for a debt, or where he suffers a loss of rights and remedies against others who could have been required to make payment, so that he cannot be placed in status quo.<sup>400</sup> In short, when the defence of loss of enrichment is conceived in its wider sense, it encompasses both the ‘reliance version’ and the ‘disaster version’ as this thesis has so far argued. This is the ideal scope of the defence.

Let us now consider in detail loss of enrichment defence and the relationship between it and other relevant defences.

#### 2.6.4. Estoppel and Change-of-Position (Loss of Enrichment) in South African Law.

Like in English law discussed earlier, estoppel differs from the defence of loss of enrichment in several respects. It is one of the defences that renders support to the proposition that defences may be of a general ambit in a dual sense, one in a wider context and the other in a more restrictive one, i.e, they may be ‘general’ in that they apply to claims that derive their cause in private law as a whole inclusive of unjustified enrichment or they may be general in the more restrictive sense that they apply to all

<sup>396</sup> *Restatement of Restitution* (1937) § 142(1).

<sup>397</sup> *Ibid.* §142(1).

<sup>398</sup> See for example *Scottish Equitable Plc v Derby* (2001) 3 All ER 818, 827.

<sup>399</sup> Comparative illustrative examples of this aspect would be *PaineWebber inc v Levy* 293 NJ Super 325, 680 A. 2d 798 (1995); *Monroe Financial Corp v DiSilverio* 529 NE 2d 379 (Ind. Ct App. 1<sup>st</sup> Dist 1988).

<sup>400</sup> See for example the American cases cited above, item 2.5.1 footnote 305-306 and accompanying text. If one were to use Peter Birks’ nomenclature it could be said that the defence ‘will relate to the enrichment condition where the detriment suffered by the defendant consists of a subtraction from his wealth; but is there is no subtraction from the defendant’s wealth, then the defence is related to an unjust retention condition.’

claims of unjustified enrichment.<sup>401</sup> Guided by this premise, it can be said that the first aspect that distinguishes loss of enrichment from estoppel is that, unlike loss of enrichment, estoppel is not peculiar to enrichment claims, but is a defence to any claim in the private law in general.<sup>402</sup> The second aspect is that estoppel requires proof of representations on the part of the plaintiff that will found a complete defence which negatives the plaintiff's assertion of his right, whether it be on contract, delict, property or unjustified enrichment, but a representation is not a requirement for loss of enrichment. Thirdly, in estoppel the defendant must show that in relying upon the representation he has changed his position to his detriment<sup>403</sup> or prejudice, but for loss of enrichment such detrimental change-of-position can be established independent of any such representation, but based exclusively on the good faith requirement. Estoppel, however, is not a procedural rule in South African law, but it is a substantive rule<sup>404</sup>; therefore it does not necessarily defeat the plaintiff's claim *in limine*. The defence of loss of enrichment, by contrast, pertains to the extent to which the defendant has ceased to be enriched by the receipt of the benefit due to the intervention of events subsequent to the receipt.<sup>405</sup> As stated above, loss of enrichment is an 'affirmative (or positive) defence', for the defendant claims that, notwithstanding a justifiable cause of action or claim, subsequent events often acting on the part of the defendant himself such as expenditure or consumption, or events beyond the defendant's control, have rendered it 'inequitable' for him to have to restore what he received either in part or in full because to this extent, he has ceased to be enriched.<sup>406</sup> The operation of estoppel is also subject to some

<sup>401</sup> R. Evans-Jones R, *Unjustified Enrichment* (2003) 326.

<sup>402</sup> For example *Glofinco v ABSA Bank Ltd (t/a) (United Bank)* (2001) 2 SA 10448 (W) dealing with the defence of estoppel in Agency situation; *Road Accident Fund v Mothupi* [2000] 3 All SA 181 (SCA) where litigant is estopped from raising new point on appeal; *Worldwide Vehicle Supplies Ltd v Auto Elegance (Pty) Ltd* 1998 (2) SA 1075 (W) estoppel applied in a vindicatory action; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) estoppel applied in the context of contract of sale; *ABSA Bank v De Klerk* (1998) 4 All SA 674 (W) estoppel considered in an enrichment claim.

<sup>403</sup> *ABSA v De Klerk* 1999 (1) SA 861 (W) 865G-J.

<sup>404</sup> The doctrine of estoppel by representation is based on considerations of fairness and justice, and is aimed at preventing prejudice and injustice. It is a rule of substantive law, and its function is to provide a defence to a claim, or to counter a defence to a claim ( see LAWSA Vol 9, §§449ff First Reissue (1996))

<sup>405</sup> *African Diamond Exporters (Pty) Ltd v Barclays Bank International Ltd* 1978 (3) SA 699 (A); *Le Riche v Hamman* 1946 AD 648.

<sup>406</sup> While it may not be apparent on the face of it that current South African law recognises the defence of change of position beyond the actual loss of the enrichment received, there is clear judicial guidance in the South African common law that the system does recognise change of position beyond that limit. Thus,

limitations. The most obvious one is that estoppel in any of the fields of private law in which it may be available, will not be allowed to operate in circumstances where it would have a result which is not permitted by law. A defence of estoppel will therefore not be upheld if its effect would be to render enforceable what the law, whether by statute or otherwise, has in the public interest declared to be illegal or invalid.<sup>407</sup> Although it is controversial and the cases that support this view have been vehemently criticised, some leeway appears to be allowed where minors are involved.<sup>408</sup>

In addition to what has so far been said, the formal availability of the defence of loss of enrichment to a defendant in a claim for unjustified enrichment requires such a defendant to show at least that he had a reasonable ground for believing that the benefit he received was his to keep and having had that reasonable belief, he acted upon it so as to alter his position in such a manner as to make restitution unjust.<sup>409</sup> Reasonableness, however, connotes the idea of 'equity' which does not squarely quadrature with the rigor of a legal rule, but evokes a general and fluid legal principle. Of course even 'reasonableness' itself has some opaque nuances that are susceptible to attack. In its determination, questions often arise as to what amounts to 'reasonable grounds' for believing that the benefit received is the defendant's to keep. So, too, it might be noted whether 'good faith' (which is at the basis of 'reasonableness') may not be sufficient to permit the operation of the

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when one reads in *Trahair v Webb* 1922 WLD 227 at 235 and again sanctioned in *African Diamond Exporters Ltd v Barclays Bank* 1978 (3) SA 699 at 713 that where 'the plaintiff bases his claim for relief on an equitable doctrine the court will be careful so that in the desire to do justice to the plaintiff, an injustice is not done to the defendant,<sup>406</sup> this assertion is clear and wide enough to allow one to firmly state that the situations that go beyond the loss of the actual enrichment received if they are causally connected to the enrichment factor, are covered in this conception of enrichment law. The defence, therefore, is wide enough to encompass both causally related expenditures and any other situations entitling the defendant to be protected.

<sup>407</sup> See for example *Fuls v Leslie Chrome (Pty) Ltd* 1962 (4) SA 784 (W) 787 where the lack of formalities required by law to render an agreement valid, for example by the requirement of writing or notarial execution, could not be remedied by estoppel, since the recognition of the defence of estoppel in such cases would be to give effect to what the legislature has in the public interest declared to be invalid. See also *Barkhuizen v Jackson* 1957 (3) SA (T) 59C-D, where similar conclusion as in *Fuls* case were reached, when the court expressed the view that where a contention based on the *exceptio doli* was advanced in a case similar to *Fuls* facts, the equitable defence (of estoppel) cannot prevail in cases which fall within the rule that contracts required by law to be in writing or notarially executed cannot be varied save by writing or a notarial instrument.

<sup>408</sup> See for example *Louw v MJ & H Trust (Pty) Ltd* 1975 (4) SA 268 (T).

<sup>409</sup> See notes 359 and 377 above referring to *Trahair v Webb* 1922 WLD 227 at 235 as well as *African Diamond Exporters Ltd v Barclays Bank* 1978 (3) SA 699 at 713E and accompanying comments.

defence in defendant's favour if he were negligent as to his belief in the entitlement to the benefit. The consideration of this issue may raise questions as to how the benefit came about to the defendant, i.e., whether by a 'deliberate' conferral by the plaintiff or otherwise. The theme of fault that this consideration may raise in relation to the defence will be dealt with in a separate chapter later in this study. It is sufficient to mention here that, generally, where one is dealing with a deliberately conferred enrichment, the law has no interest whether the behaviour that gave rise to the claim was negligent. Where, for example, the defendant demanded payment of a sum that was not due, there will probably be less reason for him to be allowed to raise loss of enrichment as a defence than if he did not. However, both as regards the question whether the defence of loss of enrichment should be allowed and for how much, it is difficult to see why the defendant's negligence should normally be a relevant consideration.

#### 2.6.5. *Concluding Remarks.*

As in the previous jurisdictions, the defence of loss of enrichment in South African law is also intertwined with the other defences in enrichment law. But it is a general defence applying across the board of the various *condictiones* and analogous legal institutions producing enrichment liabilities. Though it is a general defence it does not override all other defences, which are still applicable in particular contexts. It is a positive (affirmative) defence which is advanced on elements extrinsic to the claim; wrongdoers are not allowed to plead it, and fault is generally not a requirement; depending on the facts it may exonerate the defendant from liability either in *toto* or in part, but its scope and application in some areas remain nebulous. Although it may be unstated, it also appears to have some *equitable* features, and the notions of justice, balance, rational and reasonableness as denoted, inter alia, by the requirement of *bona fides* and the need of a causal connection between the enrichment and the *event* leading to its demise, permeate the whole field. For policy considerations its application may be limited in some areas

and there is scope that the manner in which the enrichment came about may influence the ambit of its application.

### *2.7. Overview and Conclusion.*

In the analysis of the defences above it clearly transpired that whenever a general principle of enrichment is recognised in a legal system, there arises a need to state clearly the limits of such wide liability. It was stated that some jurisdictions do so by enacting a strong change-of-position defence, other by insisting, *inter alia*, on a mirror image between enrichment of the defendant and impoverishment<sup>410</sup> of the plaintiff, or a combination of all these mechanisms, and yet others by circumscribing the application of enrichment law either through an unqualified doctrine of subsidiarity or an outright denial of the claim based on the 'supposed liability' test and perhaps some still on the 'mistake of law' rule.

Those who opt doing so via change of position as a general defence, face the task of defining the ambit of such a defence, its scope and that of the other defences and the inter-relationship between the general defence and the other particularised ones. It is however evident that whenever a change-of-position defence is recognised, its ambit and scope are not always clear. On the one side, it is a general defence to all restitutionary claims; on the other it does not cater for all the situations arising from unjustified enrichment. The need for the other traditional defences for specific situations and fact patterns is seen as necessary in all the jurisdictions we have discussed above. There may be overlaps, but objectively the law of unjustified enrichment requires more than the defence of change of position. It is however important to note that if one accepts that the defence of change of position operates to ensure that a defendant is never left in a worse position than if he had never received the enrichment at all, then, the 'but for' sense of causation must be adopted. Any loss which the defendant would never have suffered but for the enrichment, will support a plea of change of position.

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<sup>410</sup> See here for example the impoverishment requirement in South African law at C.J. Pretorius (1995) 58 *THRHR* 736 and the concomitant symmetry of enrichment at 737.



Deeper analysis permits us to remark that if due to the recognition of a general enrichment liability emphasis is placed on the defences, the law becomes amenable to striking a balance between competing interests: on the one hand, it helps the courts to avoid there being excessive restitution, and on the other it ensures that security of receipts is sufficiently protected. The expansion of change of position as a general defence to all enrichment claims also ensures that there are no arbitrary restrictions placed on liability. This is exactly what all other defences discussed above cannot do. All other defences protect, in one way or the other, a specific interest such as *res judicata* (which protects the general interest of justice in ensuring that litigation is brought to an end); payment over or agency (which ensures that agents are not exposed to unforeseen liability in the exercise of their duty and while acting within the scope of their mandate, save where they have acted for their own benefit, or have not genuinely paid over, or where they have acted in bad faith, i.e, they have paid over, but did so with due notice of the plaintiff's claim). In the same vein estoppel (which specifically protects defendants from disgorging benefits they now hold as of right because of a situation encompassing a clear representation either through a statement, an act, conduct or omission that genuinely allowed them to regard themselves as secure in their receipt and the right of entitlement thereof, and in reliance of such situation they changed position to their prejudice).

Meanwhile, the concrete relationship of change of position defence to other defences in unjustified enrichment depends ultimately on the underlying principles that a particular jurisdiction adopts for the doctrine of enrichment as a whole. For, if a certain jurisdiction bases its unjustified enrichment doctrine more on legal values than on non-legal values<sup>411</sup>

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<sup>411</sup> By legal values it is meant all values that relate to, and involve considerations of a legal policy which is to be effectuated by the law of unjustified enrichment. Non-legal values denote all values that are concerned with such social or other policies that, in turn, give birth to legal ideas and principles. For example, in some contexts, the courts are anxious to differentiate the notion of 'public policy' from that of 'policy'. Public policy is a matter of law: it determines what the law says and does, how the law approaches certain issues, such as for, example, the validity of contract, whether damages for pure economic loss should be recovered when these have been caused by the defendant's negligence, etc. In this respect the courts utilise legal concepts such as 'legality', 'foreseeability', 'remoteness', in coming to a conclusion as to the underlying policy to be served by adopting one attitude or another to the problem raised by the litigation. Policy on the other hand, is not directly or immediately concerned with the issue of law; rather it involves more complex matters of economics, morals, and the social or political purposes of the law, even

as its jurisprudential explanation of the field as a whole, the ambit of the change-of-position defence will indeed differ, from the one that bases it mostly on non-legal values.

Where legal values are the jurisprudential basis of the law of enrichment, the main concern of the law is to limit the scope of the doctrine of unjustified enrichment only to those forms or instances of recovery which have thus far been recognised by the legal system. Any novel case should be interpreted or dealt with only in accordance with previous authority. If a case can be fitted within some existing type of recovery, then a claim may be granted. If it cannot, then the law should not be distorted, in the name of development, in order to provide what a court may well think of as a 'deserving' plaintiff with a remedy.<sup>412</sup> It is however doubtful whether such an approach is ever fully adopted by any legal system, although some do come very close to fully embracing it. Where, however, non-legal values are the jurisprudential foundations of the doctrine of unjustified enrichment in a legal system, the emphasis may be placed on the general aims and nature of the law of unjustified enrichment, and not the legal and technical basis for the law. In such an approach, there might be at least three basic explanations for the existence of enrichment law. The first is founded on the notion of 'efficiency', i.e. enrichment law fulfils an economic function; the second is that enrichment law enshrines and promotes certain perceived social values; and the third is that the foundations of enrichment law is to be found on the idea of morality, which may be expressed variously as the law acting *ex aequo et bono* or in terms of the 'equitable' nature of the law, using such an expression in its sense of according to 'natural law' rather than in the more technical 'equity' form of the English law.<sup>413</sup> Of course in the 21<sup>st</sup> century saying that a certain branch of law may be based on morality, is somewhat contentious, if not properly

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the philosophical underpinnings of the law. Ordinarily in reaching a conclusion based upon, or involving, 'public policy', the courts are dealing in, and with, legal concepts and do not go outside the confines of legal doctrine or the precedents (where such are used) to find the appropriate solution. Where matters of 'policy' are concerned, however, it may be open to the courts to seek an answer outside the narrow ambit of the law, by reference to history, public morality, economic efficiency, or something else. For details on this distinction and implications on the law in general see Fridman 'The Morality of Common law' (1979) 28 *Univ. of New Brunswick L J* 67, 85-86; *King v Philips* [1953] 1 QB 429; *Anns v Merton London Borough Council* [1978] AC 728; G. H. Fridman & J. C. McLeod, *Restitution* (1982) 48.

<sup>412</sup> Cf. Lord Diplock in *Orakpro v Manson Investments Ltd* [1977] 3 All ER 1, at 7.

<sup>413</sup> G. H. Fridman & J. C. McLeod, *Restitution* (1982) 52-53.

understood, but the reality is that in practice such thing is still found in many jurisprudential writings, even of very technically advanced nations.

We have seen from the beginning that unjustified enrichment, especially in common law countries, has an equitable connotation, and allusion was made elsewhere that that being the case, also equitable defences should attach to it. This assertion is certainly perplexing and not readily acceptable. But that it permeates enrichment law, is hardly disputable. Though it continues to be controversial, the fact is that whenever a claimant seeks a remedy in unjustified enrichment, what really the plaintiff is seeking is justice, and the connotation of 'justice' includes within its ambit the idea that one person should not be enriched at the expense of another where this is against his will, intent or desire of the latter, or comes about because of, or as an accompaniment to the latter's ignorance. Therefore in one way or another, the ultimate reason for, or explanation of the law of unjustified enrichment is to achieve certain standard of justice based on principles and not fictions. The ultimate standard must of necessity include the idea of justice,<sup>414</sup> the notions of balance, rationality and reasonableness. Only in this way it is possible to explain why courts permit unjustified enrichment recovery in some instances and deny it in others.

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<sup>414</sup> See for example what is said of the concept in the recent Canadian case *Kingstreet Investments v New Brunswick Finances* (2007) 1 SCC 1 par. 37-38. See also *Peel (Regional Municipality v Canada* [1992] 3 SCR 762 at 804.

## CHAPTER III:

### **CHANGE OF POSITION IN SYNALLAGMATIC CONTRACTS: AN APPRAISAL OF THE “PARTY WHO HAS CONTROL AND CAN INSURE AGAINST THE LOSS”.**

#### *3.1. Introduction.*

In this chapter I endeavour to deal with ‘failed agreements’ and explore the applicability or otherwise of change of position in such circumstances. The chapter will first and briefly analyse on what theoretical foundations are grounded both the unqualified adherence to the proposition that ‘whenever there is a bilateral agreement, the creditor always bears the risk of loss of the object of exchange unless the debtor was at fault’<sup>415</sup> as well as the alternative theory of apportionment of losses<sup>416</sup> which is at times applied in similar circumstances.<sup>417</sup> The alternative theory is now and then applied in English law.<sup>418</sup> The chapter also considers other related positions suggested in common-law jurisdictions, but it does so in passim only. The emphasis is on the former two approaches. The discussion scrutinises not only the grounds upon which both contentions above are based, but also it discusses them critically and in comparative perspective examining the feasibility and desirability or otherwise of each approach for current South African law. The discussion will centre on the compatibility of each approach with the adoption of a general enrichment principle.

It must, however, be noted from the outset that several cases falling within this category are often borderline cases, and much of this ‘discussion’ may traditionally not be

<sup>415</sup> This is the position adhered to currently in South Africa Law. For detail on this position see D. P. Visser, *Unjustified Enrichment* (2008) 475-500.

<sup>416</sup> For other pitfalls and related concerns raised by a loss sharing approach apart from those mentioned by Visser see also A. Syke (1990) 19 *Journal of Legal Studies* 43 at 47-49; M. White (1988) 17 *Journal of Legal Studies* 353; G. G. Triantis (1992) 42 *Univ. Toronto L J* 450; R. A. Hillman (1987) *Duke LJ* 1; L. E. Trackman (1985) 69 *Minnesota LR* 471.

<sup>417</sup> In this recent book *Unjustified Enrichment* (2008) 475-500, Visser articulates these two contentions in detail and deals with the pros and cons of each approach.

<sup>418</sup> See for example E. McKendrick, ‘Frustration, Restitution and Loss Apportionment’ in A. Burrows (ed) *Essays in the Law of Restitution* (1991) 147 at 151.

regarded as part of the law of enrichment, or at least when the position is advanced that they are, some theorists resist the extension of enrichment liability to such situations.

Given the fact that the desirability or otherwise of the defence of loss of enrichment being applied in such circumstances entails that the cause of action must first be characterised as arising in unjustified enrichment rather than in 'contract', this chapter will start by examining succinctly the applicable remedies in a range of circumstances of 'failed agreements' in the jurisdictions under consideration and some incidental issues arising thereto. The rationale of this discussion is that only when the remedy is characterised as arising from unjustified enrichment, can the defence of change of position become a relevant issue.

Considering however the vastness of the issues of failed agreements, the chapter will only deal in some detail with two kinds of ineffectiveness: failure due breach and rescission as well as discharge due to impossibility of performance (frustration of purpose). Even then, the focus will mostly be on the risk allocation in cases of 'loss' or 'impossibility' of performance, with the objective of highlighting why it is significant to identify the person who has control and can insure against the loss.

### 3.2. *General Observations.*

It is unquestionable that the majority of legal systems recognise that 'ineffective contracts' understood in a very broad sense give rise to unjust or unjustified enrichment claims. A contract can be ineffective because it is void, or illegal, or it has been rescinded, or aborted in the form of discharge *de futuro* by frustration, or aborted, for instance, for failure to register it where that is a pre-requisite for its validity or where its object was unfulfilled, or where the condition upon which it was dependent never occurred, or simply it is ineffective for having been breached. While there is almost unanimity in many legal systems under discussion that in all cases mentioned above the remedy of unjustified enrichment will be entertained, it is not so in respect of the last example, where the ineffectiveness of the contract is the result of a breach and to certain extent also on the issue of 'rescission'. So, for example, the 'orthodox view' in South

African law is that in all circumstances the remedy for breach of contract is contractual, that is to say, a claim for damages, and ‘never’ (or almost never) an unjustified enrichment one. The same is also true of England<sup>419</sup> and Brazil, but not so of the United States of America. In England, apparently the orthodox view admits two slight exceptions to the rule, to which I will refer in due course. The orthodox view however, is increasingly being questioned both in England and South Africa and its orthodoxy in some contexts may be founded on fragile grounds. Ordinarily where the same facts give rise to claims both in contract and delict (tort or ‘civil responsibility’ for Brazilians), Anglo-American law, with a few exceptions, has admitted concurrent liability.<sup>420</sup> No convincing argument has been adduced in support of the idea that the simultaneous commission of two ‘wrongs’ means that one must be excused.<sup>421</sup> Civilian systems do not generally have much difficulty either in this regard. Breach of contract, however, is different. In Anglo-American law, though breach of contract in its origins was conceived as a wrong, it has not shared the characteristics of other wrongs<sup>422</sup> nor does it generally attract moral censure, nor are most contractual breaches generally treated as contrary to public policy. For these and other reasons, the ordinary measure for breach of contract in Anglo-American law is damages (compensatory damages). However, the interaction between damages as the measure of recovery in cases of ‘losing-contracts’ or other circumstances,<sup>423</sup> and the notion of ‘discharge’ for breach or ‘cancellation’<sup>424</sup> has created

<sup>419</sup> See however the qualification referred to at 3.4.2 below about English and the difficulties it encounters in practice.

<sup>420</sup> More detail on this issue appears in my separate treatment of the subsidiarity concept of unjustified enrichment in common law and civil-law which is to be published in due course in *Columbia Law Review* (New York) - Spring 2010. For the time being the manuscript is obtainable from the author.

<sup>421</sup> For a succinct discussion of the interrelations of obligations in Anglo-American law see S. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003) chapter 8 (pp 142-171). See also D. P. Visser 1992 *Acta Juridica* 230; D. P. Visser, *Unjustified Enrichment* (2008), particularly chapter 2; J. Beatson, ‘The Temptation of Elegance’ in W. Swadling & G. Jones (Ed) *The Search For Principles: Essays in Honour of Lord Goff of Chievrely* (1999) 143-170.

<sup>422</sup> Non-contractual wrongs usually have, among others, the following consequences: profits obtained from them must be given up; benefits obtained by a threat of a wrong must be restored; persuading another to commit a wrong will itself be a wrong; non-contractual wrongs, are usually contrary to public policy, and often they attract moral disapprobation, and in certain cases they may be deterred by penal sanctions. But Anglo-American law has not attached most of these to breaches of contract.

<sup>423</sup> See P. B. H. Birks (1990) *JCL* 232 for details and related issues. S. Waddams, *Dimensions of Private Law* (2003) pp. 161-162; D. Stevens & J. Neyers (1999) 37 *Alberta LR* 173; K. Barker (1995) *Oxford JLS* 456.

<sup>424</sup> Where some legal systems such as the United States of America appear to use interchangeably ‘rescission’ and ‘cancellation’ in the context of voidable contract, South Africa uses specifically ‘cancellation’.

some difficulties, sometimes blurring the line between contractual and enrichment remedies,<sup>425</sup> or, as it is sometimes put, between primary and secondary obligations.

Once again, although in some cases under Anglo-American law, particularly under the doctrine of frustration, discussed in detail below, a contract may be discharged automatically on the occurrence of an event, discharge of an effective contract for breach or repudiation is rarely automatic. Accordingly, where the contract is alleged to be ineffective by reason of 'discharge', the general rule is that in order to claim restitution an election to discharge the contract must be proved.<sup>426</sup>

Though it is generally admitted in both civilian and common law systems that an effective contract cannot found an unjustified enrichment claim, it is also now widely acknowledged that to deny absolutely the availability of enrichment claims in the absence of termination of contracts 'may neglect a small but theoretically important category of cases'.<sup>427</sup> That is the case because, although the general rationale that an enrichment claim operating before the contract is declared 'null and void' or it is 'discharged' subverts the contract, this position would seem valid only to the extent to which a contract allocates the risk inconsistently with any duty to make restitution.<sup>428</sup> Hence, one of the dominant models is now to say that, except in the case of speculative contracts, it should not be assumed, without more, that all risks have been distributed to one side or the other. That being the case, there might always be a gap in the contractual allocation of risk, which in turn might make room for adjustment either by applying the principle of unjustified enrichment or some other principle'.<sup>429</sup> Therefore, for some theorists, it should, in principle, be possible to bring an enrichment claim where it would not

<sup>425</sup> G. E. Palmer, *The Law of Restitution* (1978) 378-421.

<sup>426</sup> See discussion on American law below on the issue of election in this regard. See also R. Goff & G. Jones, *The Law of Restitution* (6<sup>th</sup> Edition), (2002) chapter 20, particularly §§ 20-001 to § 20-023; §20-035 to §20-046).

<sup>427</sup> See generally J. Beatson (2000) 1 *Theoretical Inquiries in Law* at 86; (D. P. Visser, 1992 *Acta Juridica* 203. *Unjustified Enrichment* (2008) ch. 2; G. Mead (1991) 11 *Legal Studies* 172; K. Mason & J. Carter, *Restitution in Australia* (1995) 918 observe that 'the fundamental point is that, as a general rule, restitutionary issues arise in respect of ineffective rather than effective contracts. Only rarely will the law of restitution operate in the context of an effective contract'. Amongst such rare occasions is where for example 'termination of a contract is impossible', the contract has been frustrated.

<sup>428</sup> J. Beatson, (2000) *Theoretical Inquiries in Law* at 94.

<sup>429</sup> J. Beatson, (2000) *Theoretical Inquiries in Law* at 94. See the section on American law below where I highlight the possibility of these gaps and the fault-line between the contract and unjustified enrichment doctrines.

reallocate risks or reassign value as an alternative to an action for breach of contract even before discharge.<sup>430</sup>

Let us now see how specifically these considerations are applied in the various jurisdiction under consideration.

### 3.3. Ineffectiveness of Contracts in Canadian Law.

#### 3.3.1. *Introductory Remark.*

Like in other aspects of the law, the treatment of ineffective contracts in Canadian law is influenced by from both the English and American law, but its courts' 'creativity' often distinguishes it from the other two jurisdictions more noticeably than it is often imagined. A closer look at case law and academic writings reveals that the system has subtly departed from its sibling systems in some aspects of ineffective contracts due to breach or frustration of purpose (impossibility of performance), while remaining 'faithful' to the English approach in others. The discussion that follows highlights some pertinent points and approaches followed by the Canadian jurisprudence in that regard.

#### 3.3.2. *Ineffectiveness of Contracts due to Breach.*

In Canadian law, the situation of 'restitution' on breach of contract in so far as the measure of recovery is concerned is ambivalent. First, it varies depending on whether the claim is for services rendered pursuant to a contract which is subsequently discharged by breach, or whether it concerns other contractual situations, or whether it is part of a matrimonial<sup>431</sup> issue. Some writers such as Maddaugh & McCamus<sup>432</sup> defend the approach that the calculation of the 'restitutionary relief in cases of breached contracts should be made by reference to the market value, because a contractually based limitation

<sup>430</sup> J. Beatson (2000) *Theoretical Inquiries in Law* at 94-95.

<sup>431</sup> For claims in matrimonial issues, see generally *Petkus v Bekker* and similar cases referred to in chapter three above. For criticism of the principle in such area see among others *Hubar v Jobling* (2000) 195 D.L.R. (4th) 123 (B.C.C.A.) at 135 per Southin J.

<sup>432</sup> P. Maddaugh & J. McCamus, *The Law of Restitution*, 1<sup>st</sup> ed (1990) 427-428. P. Maddaugh & J. McCamus have now a second edition of their work, but it was not available to me at the time of writing.



(i) may not reflect a number of benefits, financial and otherwise, that may flow from the ability to complete performance', and (ii) may deprive the innocent party of 'an opportunity to reduce the anticipated losses to be sustained by full performance through a possible range of cost reduction techniques'. This approach is not, however, supported by many other writers.<sup>433</sup> Generally, in cases of contracts for services, there are two different approaches to breach, depending on whether the defendant breached a warranty or a condition. If the defendant merely breached a warranty, that is to say, the defendant's breach of contract does not substantially deprive the plaintiff of what he expected to receive, then, the solution is that neither party is excused from further performance. In contrast, if it is a breach of a condition, that is to say, the defendant's breach does deprive the plaintiff of what she/he expected to receive, then, the innocent party has generally a choice which is as follows: (i) he may affirm the contract and insist upon completion of the agreement as initially contemplated. If he does so, he must then fulfil his end of the bargain. However, he is also entitled, under an action in breach of contract, to claim compensatory relief with respect to losses arising from the defendant's wrong. (ii) Alternatively, he may discharge the contract and thereby release both parties from the need to perform any primary obligations that remain outstanding. If he exercises this later option, he again may have a choice: (i) he can bring an action in breach of contract and claim compensatory relief with respect to losses arising from the defendant's wrong; or (ii) alternatively, he may be able to bring an action in unjust enrichment and claim restitutionary relief with respect to benefits that he conferred upon the defendant.<sup>434</sup>

Despite what was said above, it must however be observed that, even if the claimant has discharged the contract on the basis of the defendant's breach of condition, the plaintiff cannot escape the consequences of a bad bargain by means of contractual relief. He is generally entitled to choose between expectation damages and reliance damages. Each option is compensatory in so far as it aims to repair a loss. The former pertains to benefits that the plaintiff expected to receive under the contract, whereas the latter pertains to

<sup>433</sup> M. McInnes (2002) 52 *Univ. Toronto LJ* 163 at 214 footnote 181.

<sup>434</sup> See generally S. Waddams, *The Law of Contract*, 4<sup>th</sup> Ed. (Toronto, 1999), at ch. 16; M. McInnes (2002) 52 *Univ. Toronto LJ* 163 at 210-211; M. McInnes (1995) 23 *Australian Business LR* 218; A. Skelton, *Restitution and Contract* (1998).

losses that the plaintiff incurred as a result of relying upon the agreement. In either event, however, relief is refused to the extent that the claimant entered into a losing contract.<sup>435</sup>

The ambivalence in the Canadian law can be illustrated with two cases, one relatively old and the other somewhat more recent, that reached diametrically different results, and each of which continues to influence the courts to varying degrees. The first is *Bowlay Logging Ltd v Domtar Ltd*<sup>436</sup> and the second *Lindsay v Sutton*.<sup>437</sup> In the first case, the plaintiff agreed to 'cut, skid and load' 10 000 cubits of firewood at \$15 per cubit (100 cubit feet of solid wood). After the plaintiff performed part of the contract, the defendant committed a serious breach<sup>438</sup> by failing to provide trucks. The plaintiff then discharged the agreement and claimed compensation on the basis of the defendant's wrong. The court allowed the action but limited liability to \$250 in nominal damages. That decision is thought to have been correct as matter of contract law. The plaintiff had entered into a disastrous bargain. Although it was to have been paid a total of \$150 000 upon completion of the project, it had already incurred expenses of \$233 000, against actual payment of \$108 000, when the agreement was discharged. Therefore, as a matter of contract law, expectation damages were unavailable for the simple reason that, from the plaintiff's perspective, the contract was wholly unprofitable. Reliance damages were also refused on similar grounds. That is so, because, although the plaintiff incurred substantial expenses under the contract, its losses were attributable not to the defendant's breach but, rather, to its own improvident bargain and inefficient practices. Curiously, in this case the defendant's breach that led to the discharge actually saved the plaintiff from suffering even greater losses. As said in the American discussion below on the characterization of a losing contract,<sup>439</sup> here we have a typical situation of the wrong party breaching the contract.

How is this case illustrative of the situation? The case is illustrative because it brings to the fore what is really recoverable upon a breach of contract that appears to be a losing

<sup>435</sup> (2002) 52 *Univ. Toronto L J* 211-212.

<sup>436</sup> (1982) 135 DLR (3d) 179 (B.C.C.A.).

<sup>437</sup> [1947] O.W.N. 951 (H.C.J.).

<sup>438</sup> On the issue of serious breach see American discussion below as well as South African discussion below.

<sup>439</sup> On what constitutes a 'losing contract' see the American section above at 3.5.2.

one. The case clearly suggests that the consequences of a bad bargain cannot be avoided by means of a contractual relief, but seemingly they can be avoided by means of enrichment relief. Several commentators on this case suggested that counsel apparently was not aware of the fact and might have ‘doomed’ the plaintiff to probably lose \$100 000 for such oversight<sup>440</sup> as a result of their being less familiar with enrichment law than with contract law. That is the case because several Canadian authorities, in line with *Lindsay v Sutton*<sup>441</sup> that is briefly discussed below, also recognise that ‘once a contract is discharged for breach, the innocent party generally enjoys the ability to recover the market value of the benefit it conferred upon the defendant without regard to the terms of the contract’.<sup>442</sup>

In *Lindsay v Sutton*,<sup>443</sup> the plaintiff constructed part of a house before the defendant breached the agreement by failing to make periodic payments. Although the defendant owed \$1 300 only under the contract, the claimant was awarded \$2 650 for the actual value of the work performed. The court came to this conclusion despite evidence indicating that it was ‘unlikely that the plaintiff would have made any profit on this job and indeed might have suffered a loss’.<sup>444</sup> From this observation, some Canadian scholars<sup>445</sup> conclude that, if the plaintiff in *Bowlay Logging* had pursued an action in unjust enrichment, it would presumably have been entitled to recover the market value of the services that it conferred upon the defendant. Although it had been paid \$108 000, its expenses amounted to \$230 000. While part of that cost was attributable to inefficient practices, the objective value of the plaintiff’s services clearly exceeded the price the defendant had paid. For that reason, McInnes, for example, suggests that, as a matter of

<sup>440</sup> M. McInnes (2002) 52 *Univ. Toronto LJ* 212.

<sup>441</sup> *Lindsay v Sutton* [1947] O.W.N. 951 (H.C.J.).

<sup>442</sup> See generally *Marrison-Knudsen Co. v British Columbia (Hydro & Power Authority (No. 2))* (1978) 85 DLR (3d) 186 at 234 (B.C.C.A.); *Stevens v Colonial Homes Ltd* (1961) 27 DLR (2d) 698 (Ont. CA); *Kemp v Williams* (1978) 87 DLR (3d) 544 (Sask. CA); *O’Brien v Buffalo Narrow Airways Ltd* (1998) 171 Sask R. 217 (QB).

<sup>443</sup> [1947] O.W.N. 951 (H.C.J.).

<sup>444</sup> *Lindsay v Sutton* [1947] O.W.N. 951 (H.C.J.) at 954.

<sup>445</sup> M. McInnes, (2002) 52 *Univ. Toronto LJ* 212.

precedent, a restitutionary relief could have been awarded with respect to the difference.<sup>446</sup>

For other cases of breach of contract generally not involving services, but money, the issue is generally approached on the basis of the notion of ‘*incontrovertible benefit*’.<sup>447</sup> Usually the plaintiff would be able to satisfy the requirement of ‘enrichment’ at his expense by proving that the defendant acquired an ‘incontrovertible benefit’. That is the case because money is the very means by which the law recognises value, and no reasonable person can refuse to accept responsibility for its receipt. As a result, an innocent party who provided a monetary benefit incontrovertibly can escape the consequence of a bad bargain by means of a claim in unjust enrichment. An incontrovertible benefit can also arise if the plaintiff provided goods or services which either allowed the defendant to realise a financial gain or saved him from incurring a necessary expense.<sup>448</sup> In any event, despite the probable characterization of the claim in unjust enrichment, there seem to be no indication that change-of-position is applied to such circumstances.

<sup>446</sup> Contrast this case – *Lindsay Logging* – with the apparently unsettling American case *Boomer v Muir* referred to in the American section below, a case in which the plaintiff recovered \$ 257 000 under a claim in unjust enrichment, even though it was contractually entitled only for \$ 20 000 for work it performed for partial completion of the dam. For further insight in partial performance cases, see H. Matter (1982) 92 *Yale LJ* 14, who discusses such cases and the underlying philosophy behind the whole law in this area and in private law in general.

<sup>447</sup> The essence of the ‘principle’ of incontrovertible benefit was identified by McLachlin J in *Regional Municipality of Peel v Her Majesty the Queen in Right of Canada* (1993) 98 DLR 140, 159 (McLachlin) in the following terms: ‘An unquestionable benefit, a benefit which is demonstrably apparent and not subject to debate and conjecture. Where the benefit is not clear and manifest it would be wrong to make the defendant pay, since he or she might well have preferred to decline the benefit if given the choice’. From this proposition it is evident that the incontrovertible benefit principle defeats the subjective devaluation principle because it identified those circumstances in which it can be presumed that the defendant would not have declined the benefit even if he had been given a choice to do so. In other words, the defendant will be incontrovertibly benefited where the only possible conclusion is that he has received a valuable benefit. Hence, the simplest example of an incontrovertible benefit is the receipt of money, because no reasonable person would ever regard the receipt of money as anything other than money. (See generally *BP Exploration Co (Libya) Ltd v Hunt* [1979] 1 WLR 783, 799 (per Robert Goff); G. Virgo, *The Principles of the Restitution* (1999) 72-73; M. McInnes (2002) 52 *Univ. Toronto LJ* 163, 165; *Sherwood and Co v Municipal Financial Corp.* (2001) 197 (4<sup>th</sup>) DLR 477 (Ont. CA).

<sup>448</sup> M. McInnes (2002) 52 *Univ. Toronto LJ* 163, 216.

### 3.3.3. *Ineffectiveness due to Impossibility of Performance in Canadian Law.*

Virtually all instances that would fall under the heading of frustration of contract under English law are also recognised with similar effects under Canadian law. A contract may be discharged on the grounds of frustration when something occurs after the formation of the contract which renders it physically or 'commercially' impossible to fulfil the contract or which transform the obligation to perform into a radically different obligation from that undertaken at the moment of entry into the contract. But due to the complexities of the issues arising from frustrated contracts and the potential for inconsistency, the Uniform Conference of Canada adopted, in 1974, the Frustrated Contract Act 1974,<sup>449</sup> which tried to harmonise some inconsistencies arising from the common-law. This Act has now been adopted by the various Canadian Provinces almost with little alterations.<sup>450</sup> The Act speaks of apportionment of losses in the occurrence of certain circumstances of unforeseen events, but it heavily qualifies this possibility.<sup>451</sup> It also provides for the allocation of risks through insurance mechanisms in preparation for performance.<sup>452</sup> The Act does not apply to contracts of insurance, nor to charterparty or a contract for the carriage of goods by sea, except a time charterparty or a charterparty by demise.<sup>453</sup>

<sup>449</sup> Full text available online at Frustrated Contracts Act 1974.

<http://www.canlii.org/pe/laws/sta/f-16/20070410/whole.html> (last retrieved 09/09/2008).

<sup>450</sup> For a list of the various Canadian Provincial Acts on the matter see the online versions at <http://www.chlc.ca/en/us/index.cfm?sec=1&sub=1f4> (last retrieved 10/09/2008).

<sup>451</sup> Section 5(3) of the Act provides for apportionment in the following terms: 'Where the circumstances giving rise to the frustration or avoidance cause a total or partial loss in value of a benefit to a party required to make restitution under subsection (1), that loss shall be apportioned equally between the party required to make restitution and the party to whom such restitution is required to be made'. But this section is subject to the provisions of section 2 which make it clear that the Act only applies to a contract that 'upon its construction, it contains no provision for the consequences of frustration or avoidance'. In other words, the Act does not apply where the parties have expressly allocated the risks themselves.

<sup>452</sup> Section 6(2) provides that '[t]he fact that the party performing such an obligation has in respect of previous similar contracts between the parties effected insurance against the kind of event that cause the loss in value is evidence of a course of dealing under subsection (1). And section 6(3) 'the fact that persons in the same trade, business, or profession as the party performing such obligations generally effect insurance against the kind of events that caused the loss in value, or entering into similar contracts, is evidence of a custom or common understanding under subsection (1)'.

<sup>453</sup> Frustrated Contract Act of 1974, s. 1(2)(a)-(c). The various Provincial Acts also recognise such exceptions almost verbatim in their respective sections 1(2) as well.

### 3.4. Ineffectiveness of Contracts in English Law.

#### 3.4.1. *Introductory Remarks.*

Unlike civil-law systems that emphasise specific performance as the primary remedy in cases of ‘non-fulfilment’ of a voluntarily assumed obligation, English law generally adheres to the model that compensatory damages (save exceptions) represent an adequate remedy for protecting the aggrieved party’s interest. This approach has significant implications for how this system conceives and addresses the consequences of failed agreements due to breach as well as due to frustration (impossibility of performance).

#### 3.4.2. *Ineffectiveness of Contracts due to Breach in English Law.*

There is still some degree of uncertainty as to what extent it can be said that breach of contract gives rise to an enrichment claim in English law. For that reason there is also no all-encompassing answer that change of position is *ipso facto* made available or disallowed just because a claim arises from an ‘ineffective’ synallagmatic agreement.<sup>454</sup>

The detailed distinction referred to above under Canadian law between claims for the recovery of money, services rendered and goods delivered, also applies in English law.<sup>455</sup>

If a fundamental breach<sup>456</sup> of contract occurs, the innocent party has an election either to affirm the contract or bring it to an end. In the latter event, if he has paid money to the defendant under the contract, he can, as an alternative to claiming damages, sue for the

<sup>454</sup> R. Goff and G. Jones, *The Law of Restitution*, 6<sup>th</sup> ed. (2002) § 19-001 put it this way: ‘benefits may be conferred under transactions which are or have become ineffective. As the law now stands, there is a regrettable asymmetry between money claims and claims for services rendered and goods delivered. The receipt of money is an enrichment, but receipt of services or goods delivered may not enrich the defendant. See also at § 1-056 (on brief history of the approach on services rendered) §§ 1-017 to 1-018 (for money) and §§ 1-027 to 1-030 (for goods). The 2007 edition of Goff & Jones does not essentially alter these positions.

<sup>455</sup> See heading 3.3.2 above.

<sup>456</sup> Fundamental breach is sometimes referred to as ‘material breach’. (Note however the position in South African law which does not subscribe to the idea of ‘fundamental’ or ‘material’ breach before discharging the contract. The notion of rescission as hitherto understood in South African law does not entail the repudiation or the material breach which puts an end to the contract but rather the aggrieved party’s decision to rescind must, as a general rule, be communicated to the party in default (*Swart v Vosloo* 1965 (1) SA 100 (A) at 105, 112-113)).

recovery of the money provided that the consideration for the payment has wholly failed.<sup>457</sup> As the law currently stands, the plaintiff cannot recover money paid if the failure of consideration is partial. In such a case, his only action is then on the contract.<sup>458</sup> A party to a contract who brings it to an end on the ground of the other party's breach can recover money paid under that contract only if he can show that there has been a total failure of consideration. If he receives any part of the benefit under the contract which he can restore he has no remedy in 'restitution' (unjust enrichment). A breach of contract may be so fundamental that 'it deprives the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertakings'.<sup>459</sup> Despite the above, English law is not without problems in this respect. The difficulties besetting English law, and to some extent other common law jurisdictions, were succinctly summarised by James Carter in the following terms:

Common law writers complain that the current approach to restitution in the context of discharged contracts is unsatisfactory. Three main reasons are advanced for such unsatisfactory state of the law: the first reason is in relation to money claims, for which it is thought that the requirement of total failure of consideration is unduly restrictive; the second reason is in relation to claims for the reasonable remuneration brought against a party whose breach or repudiation led to the discharge of the contract, the rationalization of such claims in term of a right to elect between remedies in contract and restitution has led to successful claims notwithstanding that the requirements of unjust enrichment do not appear to be satisfied; the third is the difficulty of finding a general basis for restitution in relation to claims for reasonable remuneration brought by the party whose breach or repudiation led to the discharge of the contract, or in relation to the benefit conferred under a contract discharged without breach by either party.<sup>460</sup>

It is however worth noting that, since these problems are of ancient origin, some of the difficulties did not escape legislature, which has explored ways of attenuating some of them by dealing with a large body of ineffective contracts within the doctrine of

<sup>457</sup> R. Goff and G. Jones, *The Law of Restitution*, 6<sup>th</sup> ed. (2002) § 20-007 to § 20-018 (pp. 502-510).

<sup>458</sup> Ibid, § 20-018 (p. 510).

<sup>459</sup> Ibid, § 20-007 (p.502).

<sup>460</sup> J.W. Carter (1997) *JCL* 130.

‘frustration’ that was enacted into law by the Law Reform (Frustrated Contracts) Act 1943 or other special rules. Thus, in the examination of the English approach to ineffective contracts, one must first look at what the Act may say of a particular instance, before advancing to consider the position at ‘common law’ (jurisprudence in the Brazilian parlance), in general. In essence however, if the contract fails due to breach, the defence of change of position is ordinarily not made available to the parties, as it would indeed subvert the regime of risk allocation agreed upon by the parties.<sup>461</sup> That is the case even in those instances that are deemed not to potentially subvert the contract.

What is then the general approach to frustration of contracts under English law and what effects does frustration bring to the contractual duties? I pass now to consider some of these effects.

### 3.4.3. *Effects of Frustration in English Law: The Doctrine of Impossibility.*

Like in American law, the English law of frustration due to ‘infeasibility of performance’ can also be looked upon in three subsets: infeasibility due to ‘frustration of the purpose’ of the contract, frustration due to ‘impracticability’ and frustration due to an ‘absolute’ impossibility (or physical impossibility).<sup>462</sup> Frustration<sup>463</sup> of purpose, when successfully pleaded, discharges both parties from such of their contractual obligations duties as remain unperformed at the time of discharge. The doctrine of frustration of purpose however, has the danger of undermining the principle of sanctity of the contract, and for

<sup>461</sup> T. Krebs ‘Change of Position and Disenrichment in England and German’ in E.J.H. Schrage (ed) *Unjust Enrichment and the Law of Contract* (2001) 311.

<sup>462</sup> For detailed description of these subsets see the American subsection below.

<sup>463</sup> For the various meanings and uses of the word ‘frustration’ in English law see Lord Devlin [1966] *C.L.J.* 192, 206; G. H. Treitel, *Frustration and Force Majeure* (1994) §§ 2-044 to § 2-050. Treitel refers at least to four meanings: a ‘frustration of contract’, ‘frustration of the adventure’, ‘frustration of purpose’ and ‘frustrating breach’ (§ 2-045) and he critically discusses them in details in the subsequent paragraphs (§ 2-046 to § 2-050). He also refers to five theories of frustration under English law, viz, ‘implied term theory’, ‘construction theory’, ‘just solution theory’, ‘foundation of the contract theory’ and ‘failure of consideration theory’. Failure of consideration theory has been expressly rejected by the House of Lords ((1981) AC 675, at 687 and 702)), and all other theories, according to the author, ultimately dissolve in the ‘construction theory’, which is the predominant model currently applied under English law. The theory is succinctly expressed by the maxim ‘*Non haec in foedera veni*’ i.e.; ‘it was not this that I contracted to do’ sanctioned by the House of Lords in (1956) AC 696, 729 (per Lord Radcliff).



this reason it is seldom applied in England.<sup>464</sup> The same danger is also present in the concept of discharge for impracticability, for each doctrine operates in circumstances falling short of impossibility, and, because those circumstances are hard to define, each leads to uncertainty and therefore threatens the sanctity of contract.<sup>465</sup> The only subset that goes unchallenged is frustration due to ‘physical impossibility’, which is sometimes termed as ‘absolute impossibility’. Such impossibility is ordinarily *a posteriori*, i.e.; it is made manifest after the contract has been concluded, but usually before a full execution.

It must, however, be observed that discharge by supervening impossibility is not a common law rule of general application<sup>466</sup> like discharge of contract by supervening illegality.<sup>467</sup> Whether the contract is terminated or not depends on its terms and the surrounding circumstances in each case. Some kinds of impossibility may in certain circumstances not discharge the contract at all, while in other cases, impossibility might be too stiff a test.<sup>468</sup> For these reasons, it is thought that in English law the idea that there can be no contract to do the impossible is not ‘recognised’. The rejection dates back to an early eighteenth century decision of Holt CJ who asserted that ‘when a man will for valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer in damages’.<sup>469</sup>

But this unqualified proposition was later tempered by the now well-known doctrine of frustration whose history dates back to *Taylor v Caldwell*<sup>470</sup> (per Blackburn J.) - a case that established the doctrine of discharge by supervening events. The doctrine of

<sup>464</sup> See reluctance of English courts in applying the doctrine in *Amalgamated Investments Property Co v John Walker & Sons Ltd* [1977] 1 WLR 164.

<sup>465</sup> G.H. Treitel, *Frustration and Force-Majeure* (1994) § 7-032 (p.316 -317).

<sup>466</sup> Treitel put this assertion in the following terms: ‘The common-law has never adopted the simple explanation that supervening impossibility, on itself, is a ground of discharge, and that explanation would in any event not be adequate since the scope of the doctrine extends to cases in which performance is not impossible at all’ ((1994) § 16-007 (p. 578). See also a fuller discussion of this aspect in chapter 7 of his book §§ 7-001 to §7-033 (pp. 281-317)).

<sup>467</sup> For detailed discussion on English doctrine of illegality see P. B. H. Birks, (2000) 1 *Theoretical Inquiries in Law* 155; N. Enonchong, (1995) 11 *LQR* 135. This last author has since produced a full book on the law of illegality under English law.

<sup>468</sup> See the famous Coronation cases often quoted for the doctrine of ‘impossibility’ understood as ‘frustration of purpose’ rather than impossibility of performance per se (*Krell v Henry* [1903] 2 KB 740. See also McLeroy and Williams (1941) 4 *MLR* 241 and (1942) 5 *MLR* 1.

<sup>469</sup> *Thornborow v Whitacre* [1706] 2 *Lt. Rayn* 1165; 1165; the same approach was confirmed 100 years later in *Bligh v Page* [1801] 3 B & P. 295 where it was also held that ‘if a man undertakes what he cannot perform, he shall answer for it...’. For further details, subsequent cases, and development up to modern times, see G.H. Treitel, *Frustration and Force-Majeure* (1994) ch. 2 especially at § 2-007 to § 2-009 (pp. 18-22).

<sup>470</sup> [1863] 3 B & S. 826 per Blackburn J.

frustration is now known by varying names.<sup>471</sup> In *Taylor v Caldwell* it is stated that the ‘performance which is excused is only that which has become impossible’. In the earlier case that *Taylor v Caldwell* would later qualify (*Paradine v Jane*)<sup>472</sup> – a case famous for stating the doctrine of absolute contract – it was held that ‘where a party has either expressly or impliedly undertaken without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some cause over which he had no control’.

There are three further aspects of discharge in English law which are illuminating in respect of the analysis of the general ineffectiveness of contracts: These are that discharge is automatic, that it is total and that it gives rise to problems of adjustment, which have been in part to be resolved by legislation. However, the English rules governing these effects of frustration are often criticised by the judiciary. Lord Simon in *National Carriers Ltd v Paralpina (Northern) Ltd*<sup>473</sup> thought, for example, that the English doctrine of frustration could be made more flexible, so as to avoid the ‘all or nothing situation, the entire loss falling exclusively on one party, whereas justice might require the burden to be shared’. However, GH Treitel thinks that this criticism is too severe, as from the very case founding the English doctrine of impossibility – *Taylor v Caldwell*,<sup>474</sup> – the doctrine of discharge itself already operates as a mechanism of splitting, or ‘sharing’ the loss.<sup>475</sup> It did so in the sense that, while the plaintiffs were not entitled to damages, the defendants were also not entitled to the promised payments. The same was also true of *Krell v Henry*,<sup>476</sup> the outcome of which was that the plaintiffs received and retained part of the promised payment while the defendant was released from his liability to pay the balance. Some commentators, however, argue that ‘these solutions either did not carry the process of ‘sharing of loss’ far enough, or that theirs were due to accidents of timing’.<sup>477</sup>

<sup>471</sup> See G. H. Treitel, *Frustration and Force-Majeure* (1994) § 2-044 to § 2-050.

<sup>472</sup> [1647] Aley 26. See equally G.H. Treitel (supra) Ch. 2 for the facts of this case and other historical authorities cited there.

<sup>473</sup> *National Carriers Ltd v Paralpina (Northern) Ltd* [1981] AC 675, 707.

<sup>474</sup> [1863] 3 B & S 826.

<sup>475</sup> G. H. Treitel, *Frustration and Force-Majeure* (1994) § 15- 058.

<sup>476</sup> [1903] 2 KB 740.

<sup>477</sup> G.H. Treitel, *Frustration and Force-Majeure* (1994) § 15- 058.

#### 3.4.4. *Concluding Remarks.*

In sum, by recognizing that in certain circumstances a supervening impossibility dissolves the obligation, English law obliquely sanctions a change-of-position defence in the 'disaster version' as discussed in this thesis. To what extent that sanctioning brings symmetry to the law is, however, not very clear, as the system also sanctions in some instances a loss-sharing theory. But by adhering to the theory of loss-sharing such recognition does not amount to an all or nothing approach as is the case in some 'systems' on similar scenarios. The loss-sharing approach apparently postulates that contracting parties are often risk-neutral. For our purpose, the loss-sharing viewpoint, though it might be satisfactory in some circumstances, it is an approach prone to taking away the incentive to get insurance or to take sufficient precautions. If it is not clear when a risk is allocated and when it is not, one cannot be sure what a court will do under any particular scenario. That position, thus, suits only the parties who are risk neutral. But as will be seen in greater detail later in this chapter, in real life, contracting parties are not always risk neutral. Sometimes, and even often, they are risk averse (or adverse). That being the case, someone who is risk averse and who values certainty and predictability might prefer a fixed, predictable (albeit, perhaps, inappropriate) allocation of risks to a more flexible (but perhaps, more appropriate) allocation of risks that offers only a vague idea of what a court will do. Such approaches are especially valuable in situations of long term contracts.<sup>478</sup>

### 3.5. Ineffectiveness of Contracts in American Law.

#### 3.5.1. *Introductory Remark.*

In addition to looking at the ineffectiveness of the contract due to breach and impossibility of performance as such, and the proscription or otherwise of the defence of

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<sup>478</sup> D. G. Baird (1990) 19 *Journal of Legal Studies* 583, 591.

change of position in such circumstances, this section also considers briefly the issues of a losing contract which might be at the heart of accepting or denying an enrichment claim within a valid contractual allocation of risk.

### 3.5.2. *Ineffectiveness of Contracts due to Breach in American Law.*

Like in any legal system, it is commonplace in American law that when a contract has 'failed' the parties' relationship may come to an end and the aggrieved will be entitled to subsequent redress by a recognised remedy. The nature of the redress will, however, depend on *how* the relationship between the parties failed; the reason for the 'failure' and at what stage the 'relationship' came to an end. The redress may differ depending on whether the contract is either at a pre-executory stage, in the process of execution or it has already reached the stage of executed exchanges. The risk allocation becomes fixed if the agreement has reached the stage of executed exchange; that is to say, as the performance of the contract unfolds, the parties become committed not only to the benefits of the contract, but also to the risk allocation of their bargain. There is a fundamental difference, however, between a situation where the contract is deemed to have existed and subsequently 'fails' due to 'breach', and it is therefore either 'rescinded'<sup>479</sup> or 'cancelled', and a situation whereby the 'contract 'fails' not because it has been 'rescinded' or 'cancelled' due to failure of performance but because it seemed to exist but in fact did not exist. Where the contract is deemed to have existed, but it subsequently 'failed' to achieve its objective due to breach by one of the parties (or both) the relationship may come to an end through cancellation<sup>480</sup> and the aggrieved will be entitled to a redress which may take one of the three forms: expectation damages to protect the expectation interest, reliance damages to protect the reliance interest and

<sup>479</sup> See below note 458 on this notion of rescission in cases of breach of contract. See also S. Lurie (2003) 19 *JCL* 250 on the history of Rescission as remedy for breach of contract.

<sup>480</sup> See generally *American Jurisprudence* Vol. 17A, 2d (2004) § 554ss (*Contracts*) - Rescission for Cause (b) *Breach or Default in Performance*). There are however slight differences between the various American jurisdictions. In some jurisdictions (States) rescission of a contract will not be granted solely on the basis of breach, in the absence of fraud, mistake or some other independent ground justifying rescission (See for example *Hibiscus Associates Ltd v Board of Trustees of Policemen and Firemen Retirement Systems of Detroit* 50 F. 3d 908 (11<sup>th</sup> Circ. 1995); however, in other jurisdictions, rescission is a recognised remedy upon proof of breach (see example *Beckman v Kitchen* 555 N.W. 2d 699 (Iowa) and *Ross-Simons of Warwick Inc v Baccarat Inc* 217 F.3d 8 (1<sup>st</sup> Circ. 2000), cases in which it was held that 'every enforceable contract involves a bargained-for exchange of obligations, the material breach of which by one party gives the other party a right to terminate'.

restoration 'damages' to protect the restoration interest- also known as restitutionary interest.<sup>481</sup> The standard, though elliptic, definition of the expectation interest is that it puts the injured party in the same position as if the contract had been properly performed. Thus, the expectation interest measures and defines a person's rights and duties in terms of the bargain that was struck.<sup>482</sup> The expectation and restoration interest pull logically and intuitively in opposite directions, one looking forward to the fulfilment of the duties created by the contract and the other backward to the *status quo ante*.

In conventional contract law, the relationship of reliance to expectation is that of a lesser included remedy – that is, expectation includes the reliance interest, and adds to it the profit or gain a party would have realised from the transaction'.<sup>483</sup> It is also significant to note that if that profit or gain would have been negative because the contract would have been a losing one for the non-breaching party, then the reliance interest is reduced by the amount of the loss. From this holding, it has traditionally been accepted, though not without controversy, that expectation may exceed reliance, but not vice-versa, and the expectation interest is therefore considered as a ceiling on reliance damages.<sup>484</sup>

Unlike reliance, which focuses on the costs incurred by the non-breaching party, or expectation, which is concerned with the gains and losses that full performance of the contract would have produced, restitution as a remedy for breach looks to the benefits conferred by one party on the other. Here we enter the delicate fault-line between the

<sup>481</sup> *Restatement (Second) of Contracts* § 347) (1981). It must be noted here that these three interests already presuppose a substitutional remedy, that is to say the possibility of 'specific performance' – especially where the 'termination of contract is for breach' - is already discarded. Specific performance in common law is not the 'primary' remedy as it is in Civilian systems, though the doctrine of good faith in contract is bringing both systems closer and closer in this respect. Specific performance is in effect a method of protecting the expectation interest; it is a remedy that raises prudential and policy concerns not present when the remedy is substitutional.

<sup>482</sup> Fuller and Purdue, Part 1 (1936) 46 *Yale L. J.* 52 & Part 2 (1937) 46 *Yale L. J.* 373. T. D. Rakoff (1991) *Wis. L. Rev.* 204. R. E. Hudec (1982) 67 *Cornell L. Rev.* 704. For a good starting point on criticisms of Fuller and Purdue's tripartite regime of remedial interest see E. G. Andersen (1994) 53 *Maryland LR* 1 and further literature cited there.

<sup>483</sup> E. G. Andersen (1994) 53 *Maryland LR* 1, 13.

<sup>484</sup> E. G. Andersen (1994) 53 *Maryland LR* 1, 13. Sections §§ 37-38 of the *New Restatement (Third) of Unjustified Enrichment* (Tentative Draft # 3) are however reversing this proposition as they advocate the contract price as a ceiling; though the language is cast in a facultative expression 'may not exceed the price of such performance at the contract rate, where the contract price can be determined' (emphasis added). See generally Tentative Draft #3 'Reporter's Introductory Memorandum' and § 38 itself. See also Introductory Note to Chapter 4 (entitled 'Restitution and Contract') in the same Tentative Draft # 3.

contractual and the enrichment doctrines, which reveal that 'restitution's concept of benefit is somewhat elusive'.<sup>485</sup> On the one hand, it may be understood as requiring an increase in the wealth of the receiving party. In that event, one of the primary purposes of restitution is to avoid unjustly enriching one person at the expense of another. Alternatively, a 'benefit' may be understood as the commitment of labour, material, money or other resources on behalf or at the request of the receiving party. If so, restitution is measured by what it would cost in the market to procure the goods or services of the supplying party, whether or not the recipient actually was enriched thereby.<sup>486</sup> Here the notion of 'restitution' pushes us towards a contractual measure.

However, where the contract fails not because of having been breached, but because its existence was only apparent, the traditional American view on this point has long been that 'if the contract is null and void, the law assumes that there was never a contract',<sup>487</sup> and whatever performances rendered under it are to be viewed differently from the previous situations.<sup>488</sup> That is so because if there was 'never' any transaction, the fact that the 'apparent' transaction had been completely performed or not, is totally irrelevant'.<sup>489</sup> The new *Restatement (Third) of Restitution and Unjust Enrichment*,<sup>490</sup> however, departs from that traditional approach and adheres to a novel 'general principle' according to which 'a void, unenforceable and even a 'broken contract' position is the preferred basis for the parties' rightful positions for the purpose of determining if one has

<sup>485</sup> See the different approaches adopted between the Restatement First of Contracts which drew a distinction between 'restitution' in other contexts and 'restitution' as a remedy for breach, (a distinction owed to Professor Arthur Corbin as Reporter on the Chapter on Contract Remedies), and that of *Restatement (Second) of Contracts* (1981) §§ 344(2), 349, 370 and 372 in which E Allan Farnsworth (Reporter of the chapter on Contract Remedies) abandoned this distinction. While the former Restatement described the object of the remedy as a means of restoring the parties to the pre-contractual status quo, in the latter *Restatement (Second) of Contracts*, the object of the remedy was now said to serve the so-called 'restitution interest'. According to the new explanation, the object of restitution for breach is not to return the parties to the status quo ante (this is the object of what is called 'reliance interest'); rather it is to deprive the defendant of an unjust gain realised at the expense of the plaintiff.

<sup>486</sup> E. G. Andersen (1994) 53 *Maryland LR* 1, 12.

<sup>487</sup> G. Virgo, *The Principles of the Law of Restitution* (1999) 391.

<sup>488</sup> See generally *American Jurisprudence*, 66 2d (2002) §§ 15-19 - 'Restitution and Implied Contract'.

<sup>489</sup> See *American Jurisprudence* 17A, 2d (2004) § 548ss (Contracts – *Rescission for Cause* – Invalidity of Contract). See also G. Virgo, *The Principles of The Law of Restitution* (1999) 402, commenting on American law on the aspect of material breach in relation to English law.

<sup>490</sup> *Restatement Third of the Law of Restitution and Unjust Enrichment, Tentative Draft 3* §§ 37-38. (Herein after this Restatement will be called the 'Draft Restatement' unless the circumstances require otherwise).

been unjustly or unjustifiably enriched at another's expense'.<sup>491</sup> For some commentators the approach being followed by the new *Restatement* represents a major step in integrating unjust enrichment and contract, though it is also being already acknowledged that on the initial reading of the *Draft Restatement*, it seems that it is neither very clear about what this new principle actually entails, nor is it entirely consistent in working through its implications.<sup>492</sup> The new approach, in essence, is a refined reflection of the view already expressed by the current Reporter – Andrew Kull – in 1994 when he stated that 'the attempt to identify unjustified enrichment in a contractual context dissolves into contract interpretation, because we have no standard by which to measure either injustice in a contractual exchange apart from the parties agreement, actual or imputed'.<sup>493</sup>

Despite countless discussions and writings on the issue and various attempts at clarification, the relationship between restoration interest and expectation interest still remains a heated debate in American law,<sup>494</sup> especially in cases of losing contracts. The contention raised by such classic and notorious cases such as *Boomer v Muir*<sup>495</sup> is ever

<sup>491</sup> See generally M. P. Gergen (2005) *RLR* 224, 225. In the Reporter's Introductory Memorandum to the Tentative Draft # 3 (*Restatement (Third) of Restitution and Unjust Enrichment*), A. Kull (the Reporter), observes that the 'New Draft § 38 proposes that an award of restitutionary damages *may* not exceed the price of such performance at the contract rate, when a contract price can be determined'. This position obviously, departs from the language used in the *Restatement Second of Contract* § 372 and others, and reverts to what the First Restatement of Contracts had earlier provided. But the reporter acknowledges that 'adopting this position would associate the Institute (ALI) with the minority rule on a notoriously controversial point'.

<sup>492</sup> M.P. Gergen (2005) *RLR* 225. For further criticism of the New Restatement's approach see C. Saiman, 'Reemergence of Restitution: Theory and Practice in The Restatement (Third) of Restitution' (2006) Villanova Law School (Paper available online at <http://law.bepress.com/villanovawps/papers/art60> (Retrieved 13/8/08)).

<sup>493</sup> A. Kull (1995) 83 *California LR* 1209 footnote 54. Kull then contrasts, in the same place, the contractual situations to those which arise under tort (delictual – or 'civil responsibility' for Brazilians) situations holding that 'by contrast, where the defendant has committed a profitable tort, the reason unjust enrichment does not similarly dissolve into tort law is that the parties are in the case strangers: they have not fixed by agreement the rules by which each shall account to the other for benefits derived from their interaction. Justice between wrongdoer and victim is therefore defined not by contract but by external social defendant's gain (restitution) or plaintiff's loss (tort)'.

<sup>494</sup> M. P. Gergen (2002) 71 *Fordham LR* 709; C. Saiman (2006) 'Reemergence of Restitution: Theory and Practice in The Restatement (Third) of Restitution' (Paper available online at <http://law.bepress.com/villanovawps/papers/art60> (Retrieved 13/08/2008)).

<sup>495</sup> 24P 2d 570 (1933). For good starting points on this issue the following literature is instructive: Childres & Garamella (1969) 64 *NW ULR* 433; T. C. Galligan, Jr. (1989) 63 *Tulane L R* 799; G.M. Cohen (1994) 80 *Virginia LR* 1225; E.G. Andersen (1994) 53 *Maryland LR* 1; J.M. Perillo (1973) 73 *Columbia LR* 1208; J.M. Perillo (1981) 81 *Columbia LR* 37; M.P. Gergen (2002) 71 *Fordham LR* 709; M.P. Gergen (2005) *RLR* 224.; J. Dawson (1959) 20 *Ohio State LJ* 175; H. Mather (1982) 92 *Yale LJ* 14.

present.<sup>496</sup> In different styles, American law continues to ask itself: ‘What is the position where the contract is a losing one, so that performance would have resulted in a net loss to the plaintiff, is he entitled to rescind rather than use his remedies aimed at enforcement of the contract?’ While in such contexts some commentators argue that to allow such recovery constitutes an unwarranted disturbance of the risks assumed by the parties,<sup>497</sup> others are of the view that such a recovery is justified on the ground that the defendant must bear the consequences of his ‘wrong-doing’.<sup>498</sup> Restitution as a remedy for breach is sometimes viewed as a component of the reliance interest in that it includes any reliance loss to one party that also entails a benefit to the other,<sup>499</sup> but in other contexts it is also viewed as contained within and limited by the expectation interest.

Because the issue of the relationship between restoration and expectation interests notoriously arises more from cases deemed to be losing contracts, attempts have been made to clarify what actually a losing contract is. Before describing what a losing contract is, and the issues that it raises, an observation must first be made in regard to the fundamental nature of restoration interest itself in relation to contractual performance. It has already been highlighted above that the essence of restitution is the return by each party of the value of the benefit received. For this reason, restitution is thought to be about predictability and certainty.<sup>500</sup> The inquiry ends if the victim chooses the former (expectation interest) and succeeds in making the proof. If the victim claims and proves restoration, however, the breaching party has still a possible defence: that restoration damages exceed the expectation interest. However, the law as it currently stands, places on the defaulting party the burden of establishing that fact with reasonable certainty.<sup>501</sup>

<sup>496</sup> For similar cases to *Boomer v Muir* see for example *United States for Use of Sussi Contracting Co v Zara Contracting Co* 146 F.2d 606 (2d Cir. 1944). In more recent times *Allen v Dunston* 958 P.2d (Idaho, 1998); *Klein v Arkona Products Co* 73 F.3d 779, 786 (8<sup>th</sup> Cir. 1996); *Corino Livetta Construction Corp v City of New York* 493 N.E. 2d 905 (NY 1986). See also M.P. Gergen (2002) 71 *Fordham LR* 710, footnote 6).

<sup>497</sup> Childres & Garamella (1969) 64 *NW ULR* 433; E. Yorio & S. Thel (1991) 101 *Yale LJ* 111. In this article, the authors amply demonstrate with case law that courts usually protect the expectation, rather than the reliance, interest when enforcing promises.

<sup>498</sup> G. E. Palmer, *The Law of Restitution* (1978) § 4.8; J.R. Harker 1980 *Acta Juridica* 61, 84.

<sup>499</sup> E. G. Andersen (1994) 53 *Maryland LR* 1, 15 note 50.

<sup>500</sup> The requirement of certainty demanded from the victim has been relaxed over time, and in recent years the Drafters of the *Restatement Second of Contracts* recommended further relaxation. See for details Farnsworth on Contracts, (2d Ed. 1990) § 12.15 (pp. 921-923); E. G. Andersen (1994) 53 *Maryland LR* 1, 56 note 254.

<sup>501</sup> See *Restatement Second of Contracts* (1981) § 352 comment a.



It must also be noted that nothing in the fact of ‘cancellation’ on account of material breach, however, requires the victim to have access to restitution rather than expectation damages. It is simply an election.<sup>502</sup> That being the base, then, strictly speaking, a material breach means only that the victim is entitled to bring a contract to an end and receive damages according to on *an appropriate measure*.<sup>503</sup> That measure could be either expectation or restitution. There is no final indication in the notion of contract cancellation itself which suggests that one measure should be preferred over the other.<sup>504</sup> In consequence, it can be concluded with Andersen that the finding that a breach is material raises, but does not solve, the question whether restitution in excess of expectation should be permitted.<sup>505</sup>

There is however a considerable terminological confusion as to what exactly ‘cancellation’ entails. Sometimes ‘cancellation’ is interchangeably used with ‘rescission’ and ‘termination’<sup>506</sup> of contract. If cancellation is indeed equated to ‘rescission’, a considerable ambiguity arises: Where a contract is said to be ‘rescinded’ – which ordinarily occurs on ‘mutual agreements’ between the parties, the corollary is that the contract may be ignored as a source of damages measurement.<sup>507</sup> This line of argument treats rescission and restitution as a linked pair, which suggests that the invocation of the latter as a measure of damages necessarily brings the former into play. This is not the place to enter into the terminological debate. There are already excellent treatments of this issue elsewhere.<sup>508</sup> It is enough to say that though ‘cancellation’ may resemble ‘rescission’ in some cases, the term ‘avoidance’ has been preferred by many American writers to describe what occurs when mistake, lack of capacity, misrepresentation, or

<sup>502</sup> For the doctrine of election in this context see J. M. Perillo (1973) 73 *Columbia LR* 1208; but see some slight change of tone in his 1981 Article (1981) 81 *Columbia LR* 37.

<sup>503</sup> See E. G. Andersen (1994) 53 *Maryland LR* 1, 17.

<sup>504</sup> *Ibid*, 17.

<sup>505</sup> *Ibid*, 17.

<sup>506</sup> Note however that the American UCC clearly distinguishes ‘cancellation’ or bringing a contract to an end on account of breach from ‘termination’, in which no breach occurs (UCC § 2- 106 (3) – (4).

<sup>507</sup> *Boomer v Muir* put this matter this way: ‘A rescinded contract ceases to exist for all purposes. How can then it be looked to for one purpose, the purpose of fixing the amount of recovery? ...The contract is annihilated so effectually that in contemplation of law it has never had any existence, even for the purpose of being broken’ (24 P. 2d 570 (Cal. Ct. App. 1933), 570 at 577). Contrast however this position with that sustained by Andrew Burrows in English Law who thinks that where the contract is discharged by ‘mutual agreement’, there is no room to speak of applying a different standard than that of contract law.

<sup>508</sup> For South Africa see D. P. Visser, *Unjustified Enrichment* (2008) 515-525 and literature cited there.

duress infect the contract formation process.<sup>509</sup> When a contract comes to an end on account of impracticability or frustration of purpose, though that event is sometimes loosely described as ‘rescission’, the basic term ‘discharge’ appears to be more accurate and has been preferred by many theorists.<sup>510</sup> But when one party seeks relief on account of the other’s breach, the word ‘rescission,’<sup>511</sup> if employed, can be misleading. Therefore, to bring a contract to an end on account of breach is more accurately referred to as ‘cancellation’.<sup>512</sup>

### 3.5.3.2. What is a ‘Losing Contract’?

There is no unanimity about what exactly a losing contract entails and even the expression ‘losing contract’ itself is ambiguous. There, is however, some convergence as to why that one of the main reasons many theorists detest applying enrichment liability to contractual relationships, namely is the fact that one of the parties might be tempted to terminate a losing contract, and thereby subvert the regime of risk allocation voluntarily undertaken under the agreement. In principle, all contract breaches occur because the contract is a loser for one side, though not all such contracts are considered ‘losing contracts’. George Cohen,<sup>513</sup> using illustratively an economics concept of profitability, observes that ‘not all ‘losing contracts’ are jointly unprofitable, and not all jointly unprofitable contracts are ‘losing contracts’’.<sup>514</sup> According to the author, a ‘losing contract’ is one in which the breaching party is not the ‘loser’ but the party who appears to be advantaged by the contract; that is to say, the (apparently) wrong person breaches’. The problem can occur, continues the writer, ‘in contracts that are jointly profitable and contracts that are jointly unprofitable, though the restoration remedy is often appropriate in both cases’.<sup>515</sup> In losing contract cases the court need not decide whether the contract

<sup>509</sup> E. A. Farnsworth, *Farnsworth on Contracts* §§ 9.3 – 9.4. See also the American position in CISG (Convention for the International sale of Goods) and the influence it brought to that Convention in the use of the term ‘avoidance’ in Art. 7 of the Convention. See detailed comments in *Travaux Préparatoires* collected in P. Schlechtriem, *Commentary on the Convention on Contracts for the International Sale of Goods*, 2<sup>nd</sup>. Ed (OUP 1998) and 3<sup>rd</sup> Ed. (OUP 2005).

<sup>510</sup> E. G. Andersen (1994) 53 *Maryland LR I*, 21-22.

<sup>511</sup> On the history of ‘rescission’ see generally S. Lurie (2003) 19 *JCL* 250.

<sup>512</sup> E. G. Andersen (1994) 53 *Maryland LR I*, 22.

<sup>513</sup> G. M. Cohen (1994) 80 *Virginia LR* 1225, 1270.

<sup>514</sup> *Ibid.* 1270.

<sup>515</sup> *Ibid.* 1270.

is jointly profitable. The joint profitability determination matters when the court must choose between expectation and reliance.<sup>516</sup>

Where contracts sound in money, losing contract cases can ordinarily be grouped into two classes, according to Cohen, depending on whether the paying party or the performing party breaches. Seen from the compensation perspective the issue that arises in these cases is whether the 'losing' non-breacher can recover more as a result of the breach than he could if the breaching party had performed. If the performing party breaches, the other question that often arises is whether the paying party can get restitution of the prepaid contract price, even though the value of the performance to the paying party has dropped below that price.<sup>517</sup> In other cases involving a breach by the performing party, the paying party may seek recovery of its reliance expenses, even though the value of the performance dropped below the value of those expenses. Alternatively, if the paying party breaches, the question is whether the performing party can get restitution of its costs of performance, even though those costs exceed the contract price.<sup>518</sup>

George Palmer<sup>519</sup> also addressed the difficulty of the interrelation of contractual and enrichment actions in the losing contract scenarios, and basically came to the conclusion that the theoretical difficulty encountered in determining whether or not an enrichment claim ought to be available in the case of a losing contract lies in the fact that the question can be approached from several different perspectives: 'it may be viewed in terms of contractual principles only or from the point of view of unjustified enrichment or a combination of both'. If the problem is approached exclusively in terms of contractual terms, 'rescission', says the author, ought to be available since substitutionary or specific relief would adequately protect the aggrieved party's expectation interests. On the other hand, 'a contention on the part of the defaulter that the aggrieved party's negative expectancy be taken into account lacks appeal where he has been given nothing, except a

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<sup>516</sup> Ibid, 1270.

<sup>517</sup> Ibid, 1270-71.

<sup>518</sup> Ibid, 1272.

<sup>519</sup> G. E. Palmer, *The Law of Restitution* (1978) § 4.8; See also an excellent excursus of American law on the issue by J.R. Harker 1980 *Acta Juridica* 61, 84-85.

broken promise, in exchange for the performance received'.<sup>520</sup> Therefore, consideration of unjustified enrichment become applicable, since justice and equity do not require the party in default be permitted to retain an amount for which he gave nothing, merely by reason of the fact that the aggrieved party would have lost that amount had he (the defaulter) performed the contract which in fact he did not perform. In essence, if the issue is viewed solely in terms of unjustified enrichment, the focus is laid instead on the assets unjustly held by the party in default. Because considerations of enrichment do not emphasise the aggrieved party's benefits and losses under the contract, he is therefore entitled to restitution, in kind or in value, of the performance rendered unless justice and equity require otherwise.<sup>521</sup>

What is the implication of the above discussion for change-of-position defence?

It would seem obvious that in neither of the cases of the benefits arising through breach of contract that initially existed but whose object failed to materialise due to breach, there is adequate room to speak of disposing the benefit arising thereunder in reliance of the receipt or being lost without the defendant's knowledge (or in good faith). The element of 'reliance' is crucial for successfully proving a change-of-position defence arising from the 'reliance version'. In bilateral agreements, it seems a fact that a loss should be seen as possible risk voluntarily undertaken and for which the parties could or should bargain or insure. For this reason it is not surprising that the defence of changed circumstances is not favoured in such contexts. In essence, where the facts reveal that the outcome of a breach of a bilateral contract gives rise to a claim in unjustified enrichment, the defence of loss of enrichment is generally disallowed.

It is with this view in mind that the First *Restatement of Restitution* (1937) clearly made the distinction at § 65 between an enrichment arising from a 'void transfer' and that arising from 'other situations' when it stated:

<sup>520</sup> G. E. Palmer, *The Law of Restitution* (1978) § 4.8.

<sup>521</sup> J.R. Harker 1980 *Acta Juridica* 84.

‘With certain exceptions the right of a person to restitution for a benefit conferred upon another in a transaction which is voidable for fraud or mistake is dependent upon the return or offer to return to the other party anything received as part of the transaction or, where specific restoration is not required, to return its value. Accordingly, in regard to voidable contracts or transactions involving an exchange or a mutual receipt of benefits, it is a general rule that the one who seeks to rescind or avoid the contract and recover back what he has parted with must restore the other party to the transaction to the *status quo* what was received under the transaction.’<sup>522</sup>

To all intents this spirit has been preserved ever since<sup>523</sup> and all indications point to it being to a large extent preserved under the new *Restatement Third of Restitution and Unjust Enrichment* as evidenced by §§ 31-36<sup>524</sup> among others. Furthermore, §§ 37-38 of the new *Restatement Third of Restitution and Unjust Enrichment* (Tentative Draft # 3) deal specifically with Restitution and Contracts and clarify pertinent matters, as already mentioned above, departing however from the view supported in the Restatement of Contracts which does not stick to the contractual price as a ceiling in cases of losing contracts discharged for breach. Change of circumstances, however as a defence, does not seem to be considered within these provisions. Does the same rationale of ineffectiveness due to contractual breach apply in cases of ‘rescission due to frustration of purpose’ on account of impossibility of performance? I turn now to this aspect.

#### 3.5.4. *Frustration of Purpose or Impossibility of Performance in American Law.*

Generally speaking, if for some reason a contract cannot be performed due to a ‘supervening impossibility’<sup>525</sup> there arises the situation that one of the parties might shoulder the loss arising from that fact. The difficulty that flows from this is to establish who that party is, if the parties themselves have not previously agreed the assignment of risks in such eventualities. In general terms, risk allocation is an issue arising mostly in the context of validly concluded contracts which the courts either accept as having been

<sup>522</sup> *Restatement First of Restitution* (1937) § 65.

<sup>523</sup> See collection of authorities and jurisprudential application of that approach in various States at 66 *American Jurisprudence* 2d (2004) ‘Restitution and Implied Contract’ §§ 15- 16.

<sup>524</sup> References to sections made here are those of Tentative Draft # 3 (*Restatement (Third) of Restitution and Unjust Enrichment* (2004)).

<sup>525</sup> Elsewhere in this work I explain what actually ‘impossibility of performance’ may mean in contractual settings.

‘discharged’, or alternatively the ‘discharge’ of which they deny. In this context, the risk allocation of the failed contract and the ascertainment that the contract is ‘discharged’, are also linked pairs, but with diametrically differing results. That is so because on the one hand, the effect of ‘granting’ discharge is to place the risk of the event preventing performance on the ‘promisee’, while the effect of denying discharge is to place the risk on the promisor.<sup>526</sup>

Be that as it may, the classical approach in American jurisprudence is succinctly expressed in the following terms:

The obligation of restoration which is a condition to restitution upon rescission applies to anything of value which was received in execution of the contract, and the avails therefrom. Where the right to restitution is dependent upon restoration of the other party of that which has been received from him, such restoration must ordinarily be in specie; if specific restoration is impossible, restitution is denied. The restoration and offer to restore must be of the specific thing received in substantially as good a condition as when received, if that is possible, except where money or fungible things have been received.

If specific restoration becomes impossible before the party seeking restitution knew the facts and had an opportunity to act thereon, restitution is granted upon the payment of value or the imposition of conditions if justice cannot otherwise be done, except that where chattels other than fungibles were received, restitution will not be granted unless substantially all of that which has been received can be returned in as good condition as when received, if restoration is required.<sup>527</sup> A person who has received money or fungible things, and who is required to make restoration as a condition to restitution, is entitled to substitute a like amount of such a money or things in place of those which he has received. Where the subject matter has deteriorated or a portion of it has been destroyed or transferred, restitution is granted only upon the return of, or offer to return, what remains, if it is of any value.<sup>528</sup>

In addition to the return of what was received or its value, a party seeking restitution upon rescission may be required to compensate the other party for the deterioration of the

<sup>526</sup> E. W. Patterson (1924) 24 *Columbia LR* 335, 348-353.

<sup>527</sup> See *Restatement, First of Restitution* (1937) § 66 (1 to 3).

<sup>528</sup> See *Restatement, First of Restitution* (1937) § 66 (4 and 5).

subject matter, or to pay for its use, or to compensate the other for expenses incurred while holding the subject matter sought to be regained, as well as to account for losses.<sup>529</sup>

What does the above citation imply?

While it seems very clear that where a synallagmatic contract comes to an end due to breach, change-of-position is not available because the element of reliance, among other, cannot easily be satisfied; were it otherwise, the situation would open the door to an unacceptable subversion of the risks voluntarily assumed. But where the contract is frustrated by a supervening impossibility of performance due to the deterioration of the thing or other act of God, such as flooding, earth-quakes, or other similar or analogous situations, the defence of changed circumstances is not necessarily proscribed. In other words, change-of-position in the 'disaster version' may be available in such circumstances as a defence. This is exactly how one should understand the contention that the obligation is extinguished in so far as it has become absolutely impossible to perform it.

### 3. 6. Ineffectiveness of Contracts in South African Law.

#### 3.6.1. *Introduction.*

Ineffectiveness of contracts and the resulting consequences thereof in South African law are at the crossroads of two differing approaches: On the one hand the system maintains its piecemeal approach based on the various *condictiones* and the logical inferences that can be drawn from them, while on the other, it endeavours to achieve a milestone development with a balanced general enrichment principle. The result of such interaction may not always be legally sound, but it is often pragmatically logical. The section that follows will try to draw attention to some of such possible incongruencies.

<sup>529</sup> See *Restatement, First of Restitution* (1937) §§ 65, 66 Comment (a); § 157(b); § 158, § 159(1)(a).

### 3.6.2 - *Ineffectiveness of Contracts arising generally from Failed Agreements.*

The position in South African law on enrichment situations arising from ‘failed agreements’ is in short hand put as this:

‘if you have received a performance in terms of a contract which subsequently fails for whatever reason, you give it back if you still have it; if you cannot give it back, you are absolved, unless you were culpable in relation to the loss’.<sup>530</sup>

Loss of enrichment, being a general defence under enrichment liability, might also be available in cases of failed synallagmatic agreements in so far as such failure is seen to give rise to enrichment liability. This position is fully stated, articulated and critically discussed in the most recent work of Professor Daniel Visser,<sup>531</sup> and I refer the reader to that discussion for more details and nuances arising from such situations. What is discussed here is only whether it is a sound policy to allow a general enrichment principle to always apply the defence of change of position when all the elements for establishing such defence are present regardless of the nature of the situation in which the claim arises. The discussion here is, therefore, to a certain extent an appraisal of Visser’s suggested approach.

Though it has long been established under South African law that enrichment law is a body of law separate from contractual obligations, it is still true, and unavoidable, that a contract lawyer cannot ignore unjustified enrichment law because that part of the law may and does solve certain problems not dealt with by the application of contract law. As said in the introduction to this chapter, such is the case, for example, where (a) contract rules hold that there is no contract’ (e.g. void or illegal contracts); and (b) where agreements not recorded in due form (in writing, when required) are concerned. The same applies to many other analogous situations referred to earlier. In such cases, in South

<sup>530</sup> D. P. Visser, *Unjustified Enrichment* (2008) 498.

<sup>531</sup> Ibid. chapter 9. For failed mutual contracts, and the contrary views expounded by other critics or adherents to the writer’s position see more specifically pages 498-500 in which the writer discusses them in detail, and where necessary he reconciles them with his position.



African law, enrichment rules are frequently applied, to do justice between the parties in respect of performances rendered despite the invalidity.<sup>532</sup> Hence, in the context of failed agreements, Visser summarises the South African position in this way:

Here [South Africa], the person who makes the performance carries the risk. This state of affairs is brought about by the fact that the defence of loss of enrichment or change-of-position is available to each party. In other words, if you have received a performance in terms of a contract which is frustrated, you give it back if you still have it; if you cannot give it back (unless you were culpable in relation to the loss) you are absolved.

Visser however thinks that this solution, though simple and sure, is not based on good philosophy. That is so because, says the author, ‘the person who carries the risk has no control over the object’.<sup>533</sup> Thus, Visser recommends that the model suggested by Hellwege,<sup>534</sup> should ideally be followed as the correct one; that is to say, ‘rather than *res perit domino*, the person who is in control of the object of the performance should bear the risk if it goes under’.<sup>535</sup> A further advantage in structuring the law in this way, says the writer, is that ‘placing the risk in this way means that the person who is in control can insure the object of the contract (and so this model also works with the identity of risk and insurability’, which also implies that ‘it recognises the autonomy of each contracting party to be able to make the decision whether or not to take the risk of making disbursements in preparations for performance’,<sup>536</sup> or put plainly, the defence of change of position is proscribed in situations of ‘synallagmatic frustrated agreements’. Hence,

<sup>532</sup> See D. P. Visser, *Unjustified Enrichment* (2008) chapter 5, 6, 7, 8 and 9; H. McQueen 1997 *Acta Juridica* 186.

<sup>533</sup> The author also notes that this position is sometimes justified by a recourse to the adage ‘*res perit domino*’, explication that he finds unconvincing (D. P. Visser, *Unjustified Enrichment* (2008) 498). He also notes that the current South African position corresponds to the German model - *Zweikkondiktionentheorie* - in terms of which ‘each party to a synallagmatic contract has his own claim against the other party. ‘In other words’, says the author ‘the fact that you cannot give back what you have received is irrelevant because your claim for the return of the amount by which the other party had been enriched is completely independent from the claim of the other contracting party for that which he might have received from you’. Note however that according to R. Zimmermann (1995) 15 *Oxford JLS* 403, 413 footnote 17) at the time of his writing there appeared to be three theories vying for recognition in the aforesaid circumstances, namely the *Zweikkondiktionenlehre*, the famous *Saldotheorie* and the *Lehre vom faktischen Synallagma*. Whether one of them has now triumphed it is still to be ascertained. For a more detailed discussion of these theories see R. Zimmermann & J.E. Du Plessis (1994) 2 *RLR* 14 at 40ff and other sources cited there including Detlef König, *Ungerechtfertigte Bereicherung. Tatbestände und Ordnungsprobleme in Rechtsvergleichender Sicht* (1985) at 81ff; Werner Larenz in J. v. Staudingers, *Kommentar zum Bürgerlichen Gesetzbuch* (23th Ed) (1994) § 818, nn 41ff.

<sup>534</sup> P. Hellwege ‘Unwinding Mutual Contracts’ in D. Johnston & R. Zimmermann (Eds.) *Unjustified Enrichment* 262.

<sup>535</sup> D. P. Visser, *Unjustified Enrichment* (2008) 499.

<sup>536</sup> *Ibid*, 499.

where 'you have received any performance in terms of the frustrated contract you give it back; if you cannot give back what you received, you give back the value'.<sup>537</sup>

The issues that Visser's model raises are the identification of risk and its insurability. That being the case, it is vital to know what is understood by risk under contractual obligations. Is the party in control always the same as the one who can insure against the loss? Under what circumstances is risk assignable to one party? Is risk uniform or multiform? Does the nature of the risk and its nuances matter? What factors influence the decisions to take or not to take the risk of making disbursements in preparations for performance'? At what stage must the conclusion of insurance contract occur (or at what stage will the object of the contract be insured)?

Depending on the angle of analysis one takes, risk can have differing nuances. In one sense akin to an economic analysis, risk under contractual obligations may be conceived as the factor that is equal to the probability of an event multiplied by its cost. The fact that people are willing to pay to avoid risk shows that risk is a cost. Generally, however, risk denotes the probability of specific eventualities. Its precise definition varies with the field in which it is used<sup>538</sup> and within certain fields with the complexity of the endeavour. In some areas, the notion of risk is independent from the notion of value, while in others it is intertwined with that notion.<sup>539</sup> Where risks constitute eventualities independent of the notion of value, such eventualities may have both beneficial and adverse effects.

<sup>537</sup> Ibid. 499.

<sup>538</sup> For example, the notion of risk in Engineering is somewhat different from its counterpart in finances and that of statistics varies considerably with that of insurance, and so on. Commonly, in engineering the simplest definition is said to be the probability of an accident multiplied by the losses per accident, or simply is the probability of a risk occurring times the impact of such risk occurring. But as the engineering fields diversify and more complex endeavours are considered, the concept of risk becomes also more sophisticated, especially in potentially dangerous industries. In financial matters, risk is often understood as the unexpected variability or volatility of returns and it includes both potential worse-than-expected as well as better-than-expected returns. In statistics, risk is mapped to the probability of some event which is seen as undesirable. Usually, the probability of that event and some assessment of its expected harm must be combined into a believable scenario (an outcome), which combines the set of risk, regret and reward probability into an expected value for that outcome. A contractual risk, in several scenarios is associated with either the possible failure of contracting parties to deliver products, services or devices or (money) to the agreed cost, specification or at the agreed time, or with the adjacent notions of physical and natural 'disasters', such as theft, vandalism, arson, building related risks, storms, floods, droughts, or other weather related occurrences, etc, or socio-cultural and regulatory occurrences such as changes in legislations, political regimes, national or multi-national regulatory bodies, or market changes, fundamental changes in supply and demand functions and global prices for commodities. (For the concept of risk in financial world see generally P. L. Bernstein, *Against the Gods: The Remarkable Story of Risk* (J. Wiley, New York 1998).

<sup>539</sup> For further details, see among other, F. H. Knight, *Risk, Uncertainty and Profit* (Chicago- 1924) § I.I.26. M. J. White (1988) *Journal of Legal Studies* 353; A. M. Polinsky (1983) 12 *Journal of Legal Studies* 427.

However, in general usage, risk refers more to potentially negative impacts that may arise from future events, both foreseen and unforeseen if they materialise.<sup>540</sup> And, as such, there are some characteristics of value attached to it. The concept of risk is therefore complex. But before turning to the analysis of some of the above questions about risk and ancillary issues they may raise, a quick look at the South African doctrines of *restitutio in integrum* and that of impossibility of performance in general are in order.

### 3.6.3A. *Restitutio in Integrum* and Change of Position.

At this moment *restitutio in integrum* in South Africa is a matter of some debate because the proposition is sometimes advanced by the courts that this notion can sometimes mean that one party is excused from returning what he had received<sup>541</sup> and this approach is not always welcome in academic circles. On one side, *restitutio in Integrum* if seen, for example, in the context of failed contracts in general it raises the problem of the proper assignment or allocation of risks:<sup>542</sup> if the risk is placed on one of the persons, say, for example, on the plaintiff, the end result could be to allow, in effect, the defence of loss of enrichment to the defendant (although the formal position of the courts is that *restitutio in integrum* is not a contractual remedy), and consequently he (the defendant) could unwittingly found himself with a windfall ‘conferred’ upon him by the very application of law; on the other hand, if the risk were placed on the person who effectively is best able to manage it, say, the defendant, the end result could mean that the defence of loss of enrichment is not allowed; and therefore a fortuitous windfall on the defendant could be avoided. But the hurdle on this last leg of the argument is that the risk may have been allocated to the wrong party; for example where the defendant is an ‘innocent’ party. In any event, the issue of ‘*restitutio in integrum*’ arises only (or mostly) where reciprocity is

<sup>540</sup> B. Flyvbjerg (2006) 37 *Project Management Journal* 5-15.

<sup>541</sup> See for example *Feinstein v Niggli* (1981) 1 SA 684 (A) at 700 and *Extel Industrial (Pty) Ltd v Crown Mills (Pty) Ltd* (1999) 2 SA 719 at 733-734. For a detailed discussion of the authorities and some problems they raise see D. P. Visser, *Unjustified Enrichment* (2008) 519-525 (Chapter 9: Reversing Transfers in the Context of Failed Contracts).

<sup>542</sup> See in this regard the discussion of the issue by R. Zimmermann and J.E. Du Plessis (1994) *RLR* 14, 40 discussing the application and limitations of the *Saldotheorie* arising from invalid reciprocal agreements in the German law context.

at issue, and the realm of that situation is really a bit contractual, though ineffective ones; i.e., where ineffective, invalid or failed contracts are at issue. For the time being it is enough to say that this area may constitute an exception to the general rule of the application of change of position defence as hitherto discussed in this study.

### 3.6.3B. *Impossibility of Performance in South African Law.*

One of the main differences between common law and civil-law systems on the doctrine of impossibility of performance comes down to the primary remedy for breach each system subscribes to. On the one hand, if a system provides that its primary remedy is specific performance,<sup>543</sup> then, as a logical consequence, if performance of the obligation becomes impossible, the obligation is discharged.<sup>544</sup> That is so because the courts cannot enforce an obligation that is impossible – *impossibilium nulla obligatio*.<sup>545</sup> On the other hand, if a system subscribes to the damages (compensation) approach as the primary remedy for contractual breach, save exceptions, then on the occurrence of the ‘*impossibilium*’, the value can always be given, unless it is entirely infeasible. Being South Africa a mixed legal system, where does it stand between these two approaches?<sup>546</sup>

It is well established under South African law that the primary remedy upon breach is specific performance, which is the logical consequence of the principle *pacta sunt servanda*. If that [specific performance] is no ‘longer possible’ or it would be unreasonable to demand enforcement, then an award of damages is the following step.

<sup>543</sup> For an Anglo-American writer advocating a general right to specific performance of contracts as the primary remedy, see A. Schwartz (1979) 89 *Yale LJ* 271. For the extreme opposite view see the reprinted article of O.W. Holmes (1998) 78 *Boston Univ. LR* 699 (originally published in 1897); R. Posner, *Economic Analysis of Law* (5<sup>th</sup> Ed. Boston, 1998). See also the Holmes & Posner positions sanctioned by the Supreme Court of Canada in *Bank of America Canada v Mutual Trust Co* (2002) 211 DLR (4<sup>th</sup>) 385, para. 31).

<sup>544</sup> Where a contract becomes impossible of performance after it has been entered into, the general rule in (Roman law) is that it then ceases to be binding (*Wilson v Smith* 1956 (1) SA 393 (W) at 396ff).

<sup>545</sup> D. 50.17.185 and also D. 45.1.140.2 specially applied in *Wilson v Smith* 1956 (1) SA 393 (W) at 396 and the case of *Bischoffberger v Van Wyk* 1981 (2) SA 607 (W) at 610-612 discussing the different approaches between Civil-law and English law on the application of the ‘supervening impossibility of performance’.

<sup>546</sup> For some early interaction between the views expressed in the South African sources and the English doctrine of impossibility in courts see the Transvaal Provincial Division case *Herman v Shapiro & Co* 1926 TPD 367 at 372-373 (per Stratford J). See also *Peters, Flamman v Kokstad Municipality* 1919 AD 427; *Benjamin v Myers* 1946 CPD 655 and *Rousouw v Haumann* 1949 (4) SA (C) 796 at 799-801 (per Herbstein J.).

This also aligns with the principle of good faith in contract. However, one must be aware that not all contracts are equal in nature, for, some are of a personal nature, where a specific thing which is the subject-matter of the contract may have been destroyed; in other cases the alleged impossibility is brought about by operation of law; and there are even instances in which the impossibility is caused by the promisee himself, but where he is not at fault. In all these circumstances the courts may follow different approaches to deal with the specific case of impossibility of performance.<sup>547</sup> However, it may be said that under South African law, a supervening impossibility, in general, discharges the obligations of both parties to the contract if the impossibility is entire, i.e. it affects the obligation as a whole, whatever the type of contract involved. It extinguishes the parties' obligation by operation of law.<sup>548</sup> Therefore, if the obligation that would compel the defendant to disgorge the enrichment is extinguished by operation of law on the occurrence of a supervening impossibility, its effect is the same as an acknowledgement of a change-of-position exonerating the defendant from liability. Put differently, in such circumstances, the creditor ordinarily bears the loss, if the thing does go under. Is there anything wrong with this approach?

### 3.7. Risk Allocation: 'The Person who has Control'.

#### 3.7.1. A Brief Overview of Visser's Approach.

Thus far South African law, as far as the passage of risk in general is concerned, adheres unqualifiedly to the view that 'a supervening impossibility discharges the contract' and as a consequence of which the 'parties are released from the obligation to perform in terms of it.'<sup>549</sup> On the strength of this approach, the legal system has concluded that 'where one

<sup>547</sup> See generally W. A. Ramsden, *Supervening Impossibility in South African Law of Contracts* (1985) Ch. 4 (pp. 46-58). The author offers several references in the Digest for the application of the principle to specific areas of law, as well as references to Roman-Dutch and other European authors on the subject-matter.

<sup>548</sup> Voet 18.6.2; 19.1.14; Grotius, *Inleiding* 3.19.12; 3.47.1; 3.47.3; *Justinian Digest*, D. 13.1.20. Note however that under French law, supervening impossibility does not necessarily have the effect of discharging the contract. This French view is based on Pothier, *Obligations* 3.6.2.621 and 3.6.3.622.

<sup>549</sup> Van der Merwe et al, *Contract: General Principles* (2003) 512; D. P. Visser, *Unjustified Enrichment* (2008) 480-481. See also J. C. De Wet & A. H. Van Wyk, *Die Suid-Afrikaanse Kontrakreg en Handelsreg* (1992) 172ff.

party has performed in terms of a contract which is discharged by supervening impossibility and it is possible for the other party to give back the performance and that party had no expenses related to the contract',<sup>550</sup> the other party can reclaim his performance. The appropriate avenue to claim such performance, according to the standard view in South Africa, is the *condictio sine causa specialis*.<sup>551</sup> On the face of it, the virtues of the current South African position are that it avoids 'uncertainty' in the judicial interpretation of contractual allocation of risks. But does it achieve justice as the law is expected to do?

Visser, for example, considers whether the law should move towards apportionment of losses in cases of supervening impossibility outside what is achievable under the principle of unjustified enrichment as tempered by the loss of enrichment defence, or if that is a bridge too far, whether to adapt in any way the application of the *condictio sine causa specialis*.<sup>552</sup>

In answering these questions, Visser argues that 'it is inappropriate to make apportionment of losses a goal of the winding up of frustrated contracts, neither the

<sup>550</sup> D. P. Visser, *Unjustified Enrichment* (2008) 484.

<sup>551</sup> The '*condictio sine causa specialis*' is one of the forms in which the Roman law '*condictio sine causa*' could appear, i.e., a '*condictio sine causa generalis*' and a '*condictio sine causa specialis*'. The '*condictio sine causa generalis*', according to historians, could take the place of any of the three *condictiones* (i.e., '*condictio indebiti*', '*condictio causa data causa non secuta*', '*condictio ob turpem vel iniustam causam*'). If one of these *condictiones* lay, the *condictio sine causa generalis* could be used instead. If none of them was available, neither the *condictio sine causa generalis* (See generally Voet, *Commentarius ad Pandectas* (1778) 12 7 1; LAWSA (2005) § 219. The '*condictio sine causa specialis*', on the other hand, was available in certain circumstances where none of the other *condictiones* could be instituted. The terms '*condictio sine causa generalis*' and '*condictio sine causa specialis*' are not themselves, however, of Roman origin. They are the creation of later writers on Roman law. The '*condictio sine causa specialis*' in current South African law tend to be available in the following areas: (i) where money or property has been transferred to the defendant in term of a valid causa which later falls away' (here would fall our example of performance terminated by a supervening impossibility); (ii) in the case of a defendant who has *bona fide* disposed of or consumed the plaintiff's property if (a) the defendant obtained the possession of the property through negotium between himself and the plaintiff; (b) the defendant obtained possession of the plaintiff's property consisting of money otherwise than through negotium with the plaintiff, gratuitously, that is to say *ex-causa lucrativa*'; (iii) in the cases where, for example, banks seek to recover the amount paid to the payee of a cheque after the cheque had been countermanded by the drawer; and (iv) in cases where ownership of property is transferred sine causa to the defendant but the circumstances are such that none of the other *condictiones sine causa* would apply" (See generally LAWSA 2<sup>nd</sup>. Ed. Vol. 9 (2005) §§ 220-221) (per JG Lotz, updated by F.D.J. Brand); D. H. Van Zyl, *Negotiorum Gestio in South Africa Law* (1985) 85-97; 160-171).

<sup>552</sup> D. P. Visser, *Unjustified Enrichment* (2008) 484.

change of position defence should be made available to frustrated bilateral contracts.<sup>553</sup> Visser also thinks that ‘loss apportionment (“allocation” in his text) is sometimes defended (indicated) by the need to protect the ‘reliance interest’ of the parties’.<sup>554</sup> But he questions the soundness of that approach in cases of frustration by supervening impossibility, save where the contract is divisible and parts of which were capable of having been performed independently, for, says the author, ‘one might argue that it is not the contract as such that is being relied upon, since there is no contract’.<sup>555</sup> But this is not the approach that is usually followed<sup>556</sup> and therefore the ambiguity continues. As there is no clear-cut answer, Visser then suggests that the way forward is placing the risk on the person who has control and can insure against the loss. In essence, Visser’s suggestion is to the effect that there must be a ‘judicial identification’ of the ‘superior’ risk bearer at the moment the loss occurs, and therefore, there should be no pre-determined liability in cases of ‘impossibility of performance’ due to frustration. In other words, the principle that ‘*res perit domino*’ should not be accepted without exception. In order to make his point clearer, the author illustrates the argument with the following example taken from Philip Hellwege’s writings.<sup>557</sup>

‘**A** and **B** have a contract of sale [of a horse]’. **B** has transferred the horse to **A**; the full price is already payable but **A** has so far paid only half. **A** and **B** are in different countries and the contract is frustrated by an outbreak of war between them. The war destroys the horse’.

With this illustration Visser argues that ‘if **A** sues for the return of the payment that he has made (the amount by which **B** can be said to have been benefited), **B** has to give the value of the horse which he is unable to return. If **B** sues **A** for the return of the horse, he must give back what he received’. At this point, Visser enters the realm of risk insurance

<sup>553</sup> See also Thomas Krebs who argues that ‘where exchanged performances are concerned, there is a general agreement that the change of position defence needs to be modified, or disregarded completely’. T. Krebs ‘Change of position and Disenrichment in England and Germany’ in E.J.H. Schrage (ed) *Unjust Enrichment and the Law of Contract* (2001) 311.

<sup>554</sup> D. P. Visser, *Unjustified Enrichment* (2008) 496.

<sup>555</sup> D. P. Visser, *Unjustified Enrichment* (2008) 496.

<sup>556</sup> D. P. Visser, *Unjustified Enrichment* (2008) 496-497; P. Hellwege, ‘Unwinding Mutual Contracts: Restitution *in Integrum* v the Defence of change of position’ in D Johnston & R. Zimmermann (eds.) *Unjustified Enrichment* (2003) 243 at 272.

<sup>557</sup> P. Hellwege, ‘Unwinding Mutual Contracts: Restitution *in Integrum* v the Defence of Change of Position’ in D. Johnston & R. Zimmermann (eds.) *Unjustified Enrichment* (2003) 243 at 272 and again P. Hellwege’s *Rückabwicklung* 130ff.

in the illustration process before he concludes the argument. So he continues explaining that 'if **A** has not insured the horse, the fact that the value received is the measure of enrichment means that he will be out of pocket, but because he was able to insure it and elected not to do so makes it completely unobjectionable that he should shoulder the loss'. Obviously, there are exceptions to every rule, and according to the author, the only exception to the principle that 'each party must restore what they received, or its value, is 'where the loss would also have happened if the enrichment creditor had had it under his control, *and* it is not an instance where it is customary for the enrichment creditor to insure the object even though it is not under his control'.<sup>558</sup> On the other hand, continues Visser:

If **B** has spent the money that he received while it is still possible for the contract to be frustrated, the same principle will mean that he will be out of pocket, but the fact that this outcome is in accordance with recognizing his autonomy in determining the degree of risk that he wishes to take, also makes it appropriate that he should bear this risk.<sup>559</sup>

### 3.7.2. *The Person 'Who Has Control And Can Insure Against the Loss': An Appraisal.*

Visser's argument presented above is concise, articulate and clear; it needs no further glosses to understand it. The *pros* and *cons* of his approach are clearly set out in his own argument and explanations, a task that he did thoroughly and persuasively. The further question that however arises is whether the suggested approach has touched upon all the nuances of risk allocation in the event of failed synallagmatic contracts, especially those that are terminated due to impossibility of performance. That is so, because, impossibility of performance is a complex and intricate doctrine.<sup>560</sup> First of all, it may be argued that in contractual context, impossibility as such is an 'artificial' concept, as performance is almost never impossible, because if that which was agreed is not physically possible, its

<sup>558</sup> D. P. Visser *Unjustified Enrichment* (2008) 500; also citing Hellwege's *Rückabwicklung* 130, who also cited W. Flume 'Der Wegfall der Bereicherung...' (1953) 103, 172ff.

<sup>559</sup> D. P. Visser, *Unjustified Enrichment* (2008) 501.

<sup>560</sup> Visser explanations does refer to some of the complexities such as objective and subjective impossibility, and the difference between legal impossibility and physical impossibility, and the contention of divisibility or otherwise of the performance (pp. 479-486).



value is always possible, unless it is an agreement that involves the status of a person.<sup>561</sup> What is really logical is to say that on the happening of certain events, requiring a party to perform can be so 'uneconomical' with the result that if the law stood silent, it would be ridiculed. But even if one immediately accepts the conventional wisdom that there is such a thing as impossibility of performance, it is not always self-evident from the case law what exactly impossibility of performance means. For example, no one would doubt that, either 'commercial impracticability' or 'frustration of purpose' constitute impossibility of performance; but the case law sometimes lump them together as cases of impossibility of performance.<sup>562</sup> Thus, for practical purposes and brevity sake one can say with Posner & Rosenfield<sup>563</sup> that the subject of impossibility could be subdivided in three subheadings, namely: 'impossibility of performance', 'frustration of purpose' and 'extreme impracticability'. 'Impossibility' per se is the rubric to use when the carrying out of a promise is no longer 'physically possible', and 'frustration of purpose' is the rubric to use when performance of the promise is physically possible, but the underlying purpose of the bargain is no longer attainable.<sup>564</sup> Impracticability, in turn, should be the catch-all term for any discharge case that does not fit comfortably into either the pure impossibility or the frustration moulds. Impracticability is therefore suitable for use when performance of the promise is physically possible and the underlying purpose of the bargain achievable, but as a result of an unexpected event enforcement of the promise would entail a much higher cost than originally contemplated.<sup>565</sup> It is noteworthy highlighting that for this third subset it is difficult to articulate a standard as to what magnitude of cost change is necessary to justify discharge on the ground of impracticability.<sup>566</sup> Where courts have used it as applying to impossibility cases, they are

<sup>561</sup> For example, where the agreement is for marriage and the bride dies, there is indeed a 'physical impossibility', to marry a dead person. But if the agreement is a trip to the moon, the performance may be technically feasible, but economically prohibitive. On subjective and objective impossibility see also *Unibank Savings and London Ltd (formerly Community Bank) v ABSA bank Ltd* 2000 (4) SA 191 (W) 198.

<sup>562</sup> Other terms used in practice are 'physical impossibility', 'legal impossibility', 'impracticability', 'personal inability', 'increased difficulty', and of course 'frustration of object'.

<sup>563</sup> R. A. Posner and A. M. Rosenfield (1977) 6 *Journal of Legal Studies* 83, 85.

<sup>564</sup> See for this subset the famous English 'coronation cases' in which landlords rented premises to customers who were eager to view the coronation procession of King Edward VII, but the coronation was cancelled due to Edward's illness and discharge of contracts was sought on ground that the underlying purpose (the viewing of the procession) had been frustrated. (For comments on this cases see McElroy & Glanville Williams (1941) 4 *MLR* 241; Posner & Rosenthal (1977) 6 *Journal of Legal Studies* 83, 85 footnote 8 and 9.

<sup>565</sup> For some practical examples, see *Restatement (First) of Contracts* (1932) § 454.

<sup>566</sup> Discharge on this ground is normally not objectively recognised in most of the jurisdictions under consideration. But a more critical analysis can yield unexpected subtle recognitions even on this ground.

prone to say that ‘mere hardship’ is not enough. They thus safeguard the integrity of the bargain principle. Some cases point to examples of costs being infinite, if performance were required; hence the label of impossibility applied to them.<sup>567</sup> But whether the cost is infinite, or merely prohibitive relative to the gains from performance (as in the impracticability and frustration cases), it is really a distinction without much relevance to the purpose of contract law in general. For this reason, it is thus thought that there is no functional distinction between impossibility and frustration cases on the one hand and impracticability cases on the other.<sup>568</sup> The reality indicates that in every discharge case the basic problem is the same: to decide who should bear the loss resulting from an event that has rendered performance by one party highly ‘uneconomical.’<sup>569</sup>

Based on the reflection and observations above, I explore some further contours of risk allocation in this section. In doing so, I will not repeat the discussion which is already clearly set out in detail in Visser’s work, save to direct the reader for some salient points, should the need to do so arise. My objective here is to highlight those additional nuances associated with the concept of risk allocation in contractual contexts that may deepen the understanding of the ‘*person who has control and can insure against the loss*’.

### 3.7.3. Is ‘*The Person who has Control*’ also and always the same as the ‘*One who can insure against the Loss*’?

If the answer lies in identifying the ‘person who has control and can insure against the loss’, and remembering that we are dealing with situations where the ‘contract’ was initially validly concluded, then the further question that arises is really about knowing how the parties allocate risks in contractual settings. We must first ask ourselves, what is a risk? At what moment the risk must be allocated in contractual settings? Is the risk of

<sup>567</sup> See R.A. Posner & A.M. Rosenfield (supra) at 86, footnote 9.

<sup>568</sup> See Comment: (1948) 46 *Mich. LR* 401. For related issues to impossibility of performance Robert L. Birmingham (1969) 20 *Hastings LJ* 1393, especially at 1399; Allan Schwartz (1976) 50 *S. California LR* 1 (this author discusses contract cases in which inflation was the event causing no performance. In that light, inflation is a risk, which if it becomes uncontrollable, is tantamount similar to frustration of purpose cases.

<sup>569</sup> Posner & Rosenfield (1977) 6 *Journal of Legal Studies* 83, 86.

loss allocated invariably and similarly between the parties? Does allowing a 'judicial identification' of the superior risk bearer at the 'moment of loss' conform to an '*ex post facto*' (*a posteriori*) allocation of risk or to an *a priori* allocation?

#### 3.7.4. *The Dynamics of Risk Allocation.*

There are two possible differing effects in evaluating the risk allocation in the context of failed agreements due to a supervening impossibility. In either case, the first question is to ascertain whether the contract is deemed to have been discharged or not on the occurrence of the unforeseen event. That is so because, on the one hand, the effect of discharging the contract is to place the risk of the event preventing performance on the promisee, while the effect of upholding it is to place the risk on the promisor.<sup>570</sup> These effects, of course, depend in part, on how the parties themselves allocated, or are assumed to have allocated, the risk of the unforeseen events from the inception of the agreement itself.

At the stage of the formation/or negotiation of the contract the parties may directly or indirectly have chosen to allocate the risk of the unknown and unforeseen events differently, depending on how the parties could have estimated the probability of the occurrence of such a risk. Unquestionably, if the parties have objectively chosen to allocate the risk of unforeseen events in a particular way, that manner should be followed. This, of course, brings back the contention that 'reliance' must be placed on the contract, and the resulting remedy should also be 'contractual'. Whatever perspective one chooses, the resulting approach is not a contentious issue for the time being.

To start with, one must distinguish two types of risks: an 'endogenous risk'<sup>571</sup> and an 'exogenous risk'.<sup>572</sup> Equally important is the risk attitude assumed by each party towards

<sup>570</sup> E. W. Patterson (1924) 24 *Columbia LR* 335, 348-353.

<sup>571</sup> As examples of an 'endogenous risk' one can cite a mechanical failure of an aircraft engine, which is ordinarily and mostly preventable, though not at 100 per cent assurance; an insolvency of a Bank, although it depends on which side of the coin one sees it; etc.

<sup>572</sup> Are ordinarily considered exogenous risks the following: 'acts of God' (or natural disasters), fires, acts of war, riots, insurrections, orders of court or regulatory agencies, destruction of machineries, strikes, lockouts, or other industrial disturbances.

the various subsets of possible future risks. While an ‘endogenous risk’ is generally more amenable to control, obviously, depending on its nature, an ‘exogenous risk’ tends to be completely independent of the parties and sometimes nothing can be done to control it. If a party to an agreement assumed an attitude that was risk neutral, it cannot be expected of him to take measures beyond ordinary risk control, because, in principle, such party would only be interested in the *averse* risk.<sup>573</sup> However, a risk *averse* party is not precluded from adopting secondary strategies to minimise the chances of it happening and the costs of bearing the residual risk.<sup>574</sup> This possibility of a risk averse party bearing the residual loss is, in my view, what underpins Visser’s approach in its second leg when he asserts that the method also ‘recognises the autonomy of each contracting party to be able to make a decision whether or not to take the risk of making disbursements in preparation for performance’. In essence, Visser’s account on this second leg is about the optimal allocation of the risk. An optimal allocation of the risk is ordinarily a function of the parties’ comparative advantages in risk control and the residual risk management, as well as their risk preferences. In circumstances where all things are equal, a given risk should ordinarily be borne by the party who can implement measures to control it at the lower cost.<sup>575</sup> This is typically the party whose performance is affected by the risk, should there be one. If that party is also risk neutral, it should bear the risk.

It must be highlighted however that the optimal allocation is less clear where the superior risk controlling party is averse to the residual risk. In this situation, if all other things are equal, the residual risk should be allocated to the party that is the superior risk manager. However, in real life, the superior risk manager is not always easy to identify, and is often not the party with the comparative advantage in risk control. Being this the case, in ascertaining ‘the person who has control and can insure against the loss’ further consideration must be given to the parties’ attitude to the risk, because such attitude also varies according to the context and the nature of the agreement entered into. As already highlighted above, in some cases a party may be risk neutral, while in others it may be

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<sup>573</sup> G. G. Triantis (1992) 42 *Univ. Toronto LJ* 450, 455.

<sup>574</sup> *Ibid*, at 455.

<sup>575</sup> *Ibid*, at 456

risk averse. Even where the parties have agreed on risk allocation, there may remain a possibility of under-assessing the extent of the risk by one party or by both. But it should still be emphasised that if the parties have expressly assigned the risk to one of them, there should normally be no occasion to inquire into which of them is the superior risk bearer. Nonetheless, a party can be a superior risk bearer for one of two reasons: first, he may be in a better position to prevent the risk from materializing (here because either he has control of the object (or of the situation), as in the first leg of Visser's approach; or he is the superior insurer. As insurance is a method (alternative to prevention) of reducing the cost associated with the risk that a performance of a contract may be more costly than anticipated, it is a particularly important process of cost avoidance in the impossibility context because the risks with which that doctrine is concerned with may not necessarily be preventable by the party charged with non-performance.

Given that prevention is but one way only of dealing with risk, insurance is then the other means of dealing with the effects of risk, if it does materialise. Here we encounter the second leg of Visser's approach, as already mentioned above. Should the promisor be the one in the position of a 'superior risk insurer', then his inability 'to prevent the risk from materializing should normally not operate to discharge him from his contract, anymore than an insurance company's inability to prevent, for example, a fire on the premises of an insured should excuse it from its liability to make good the damage caused by the fire.'<sup>576</sup>

On this insurance leg of the analysis, one must also take into account two further aspects that may arise, should the parties have directly or indirectly assigned the risk in their agreement. There may be a mutual under-assessment or simply a unilateral under-assessment of the risk. If both parties under-assessed the risk to the same extent, the allocation of the risk should appropriately be determined by other factors, such as differences in risk management capabilities and risk preferences.<sup>577</sup> If there was a unilateral under-assessment of the risk, the party so assessing it should bear the loss, if all other factors also militate against him. It must be noted however that to the extent that the

<sup>576</sup> See R.A. Posner and A.M. Rosenfield (1977) 6 *Journal of Legal Studies* 83 at 90-91.

<sup>577</sup> G. G. Triantis (1992) 42 *Univ. Toronto LJ* 476.

unilateral under-assessment was influenced either due to persistent cognitive errors or due to biases, the party to whom such risk is allocated may suffer disproportionate loss in the contract for bearing the risk. In such circumstances, judicial intervention might be justified to redress a possible inequity, and avoid potential unjustified enrichment of one party to the detriment of another.

In certain other circumstances, the determination of the superior risk manager may be a complex exercise, because from time to time it depends on factors that frequently may point to opposing directions. If such is the case, sophisticated parties usually may be able to weight themselves at the stage of the formation of their agreement the comparative advantage in each aspect of risk management and allocate the risk to the lowest bearer in the aggregate. Alternatively, they may agree to a risk sharing arrangement. For example, one party may be in a better position to estimate the probabilities of the occurrence and the other party may be better able to estimate the magnitude of the loss in the event risk materialises.<sup>578</sup> But all of these depend on how the parties' attitude to risk is in the particular circumstances. One cannot pre-deterministically assign the risks in such circumstances.

### 3.7.5. *The challenges of an ex-post facto risk allocation.*

The challenges to Visser's suggested approach is that to a certain extent it postulates a judicial identification of the superior risk bearer and it makes the case for an *ex-post facto* judicial allocation (or *reallocation*) of risks. That is so because it rejects a 'pre-determination' of a loss bearer, as hitherto advocated in South African law. The virtues of the current South African position are that it avoids 'uncertainty' in the judicial interpretation of contractual allocation of risks. Its main 'axiom' could equally run like this: 'better have one person know for certain that he is responsible, even if the other [person] is the superior risk bearer', regardless of whether that might result in injustice or not. Visser's suggested approach is, however, essentially to the effect that if, on the same factual scenario, one of the parties was in control of the thing (or of the situation) or he is

<sup>578</sup> G.G. Triantis (1992) 42 Univ. Toronto LJ 452.

deemed to be the superior risk bearer and the situation might result in injustice to the creditor, the risk can be re-allocated. That allocation (or rather re-allocation) must however follow an '*optimal*' approach.

On the face of it, Visser's suggested approach will come up against, among others, two possible hurdles, namely: (i) the 'competence' of the courts to identify the superior risk bearer and (ii) the predictability of such determination. It might face the predictability hurdle because critics might argue that if it is not clear when a risk is allocated and when it is not, one cannot be sure what a court will do under any particular scenario. Someone who is risk averse and who values certainty and predictability might prefer a fixed, predictable (albeit, perhaps, inappropriate) allocation of risks to a more flexible (but perhaps, more appropriate) allocation of risks that offers only an imprecise idea of what a court will do. Given that in many contractual situations some parties are risk averse, the legal system might be tempted to stick to the current approach that seemingly offers more predictability with its pre-deterministic view.

The suggested approach, however, makes it clear that the factors that make one party a superior risk bearer are the party's ability to prevent or control the materialization of the risk, as well as its risk preferences and its ability to reduce the cost of the residual risk through insurance or perhaps even through '*hedging* in the financial markets'<sup>579</sup> if there is such opportunity in some complex business dealings. That is so because when the author remarks in the hypothetical Hellwege example of a horse he uses to illustrate the approach that '(...) but because he [the party] was able to insure it and elected not to do so makes it unobjectionable that he should shoulder the loss', or earlier in acknowledging the exception (...) 'where the loss would also have happened if the enrichment creditor had had it under his control, and it is not an instance where it is customary for the enrichment creditor to insure the object though it is not under his control',<sup>580</sup> the approach demonstrates that the fears of unpredictability may be unfounded or at least overstated. Although it is mostly true that allocations of risks by law to the superior risk

<sup>579</sup> 'Hedging in financial market' here is understood as the practice of purchasing and/or selling a financial instrument specifically to reduce or cancel out the risk in another investment.

<sup>580</sup> D. P. Visser, *Unjustified Enrichment* (2008) 500.

bearer fulfill their purpose only to the extent that they are certain or predictable, the author also makes it plain that should the risk be 'exogenous' and at the time of contracting could be deemed to be remote, but the materialization of which could be severe, the contractor should always avail him/herself of the residual risk management opportunities available to the parties, as safety nets. A party who unreasonably ignores them, must bear the loss should the risk materialise. Furthermore, the author's position when he asserts that 'he was able to insure it and elected not to do so', seems to me to exactly express these precautionary measures that are available to the contracting parties in order to offset any supervening risks.

### 3.8. Conclusion

In sum, the suggested approach that in synallagmatic agreements the way forward is to first 'identify the party who has control and can insure against the loss' is founded on solid grounds and accords more with justice in situations of frustration of purpose for supervening impossibility, than the 'pre-deterministic approach'. This view also squares with the general principle of unjustified enrichment as argued throughout this thesis that places emphasis not only in what is happening on the assets of the claimant but also in those of the defendant. But because there are mechanisms available to the parties to avoid the consequences of unforeseen future risks, even if such risks might seem remote at the time of contracting, common sense dictates that the one that was able to take measure to avert the risk or minimise its impact, if it did happen, must shoulder the risk of loss. Said, differently, loss of enrichment (change-of-position), as a general defence, should not be open to the parties.

The loss-sharing approach is equally properly rejected because of its potential to inject some confusion in the administration of justice. That is the case, notwithstanding the possibility of being satisfactory in some circumstances, it would be utterly unsatisfactory in a range of other cases if it is meticulously scrutinised. The loss-sharing approach is prone to taking away the incentive to get insurance or to take sufficient precautions. That is so because the approach postulates that the risk can be in one of the parties or the other,



but it fails to explain why it should not be on the party who might not have chosen to shield itself from the risk of some unforeseen future event rather than on the party that did not want to take any.

Furthermore, where one of the parties is risk-neutral, if the risk were truly unexpected, so that no precautions could have been taken against it, and if neither party was better equipped to deal with the problem when it arose, then it would make no difference who bore the loss. The amount of the loss being borne is the same. It cannot be reduced by dividing it in smaller pieces. In such scenarios the reality dictates that there is no reason to keep the risk on one party, but there is equally no compelling reason to shift it away either.<sup>581</sup> Hence, where the balance does not favour one party or the other, the risk should lie where it now stands.

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<sup>581</sup> D. G. Baird (1990) 19 *Journal of Legal Studies* 583, 590.

## CHAPTER IV.

### ENRICHMENT SINE CAUSA: THE ENIGMA OF THE LOSS OF ENRICHMENT DEFENCE IN BRAZILIAN LAW.

#### 4.1.0. Introduction.

Despite its Roman law foundations, and even though it provides for a general enrichment action which is essentially an *actio de in rem versio*, Brazilian enrichment law, *prima facie*, does not directly recognize loss of enrichment (or change of position) as a defence to an enrichment claim. The reason for such direct omission is not very clear. The legislative history is silent on the issue and academic writing (known as '*a doutrina*' in the country) seldom discusses the field as a whole in any great detail, and virtually none of the writers has alluded to this defence. However, a careful reading of various provisions of both the 1916 and 2002 Civil Codes reveals that the system does not escape entirely from such a defence. Traces of it subtly appear in the formulations used in drafting certain provisions of the Civil Code on unjustified enrichment, as well as in other parts of the Code. Because the drafters felt the need to remain faithful to the Roman tradition, and structured the whole law of unjustified enrichment using the dual structure<sup>582</sup> of *condictio* and *actio de in rem verso*, some of those traces became prominent, perhaps unwittingly so. In addition, some early academic writings such as that of Pontes de Miranda drew some attention to the defence when he held that: 'what is given in the case of unjustified enrichment is not the value of the thing at the time that the enrichment occurred, but the value of the defendant's enrichment as it enriches him at the time the action is brought'.<sup>583</sup> This clearly suggests that the measure of enrichment is the remaining enrichment and not the received enrichment, save exceptions. In the same vein Agostinho Alvim also espoused, it would seem, the same view when he contended

<sup>582</sup> It could also be said that the structure is 'tri-dimensional' if one adds *negotiorum gestio* which appears in the same title as the other two. But because only some aspects of *negotiorum gestio* qualify as leading to an enrichment claim, I prefer to refer to the structure as strictly dual rather than tri-dimensional, save when explaining the nomenclature of the field and related aspects which will appear below.

<sup>583</sup> Pontes de Miranda, *Tratado das Obrigações*, Vol. 26 (1959) 167.

that one of the essential elements of an enrichment *sine causa* is the existence of the enrichment, and thought that

‘because [in an enrichment action] what is at stake is restitution for enrichment, and not indemnification for damages, the enrichment must exist at the time of the action. If it existed, but ceased to exist, as a rule, there is nothing to restore. Such hypothesis, however, must not be confused with the substitution of the thing, because, if it does not exist because it was transferred, this will be a case of subrogation in the price’.<sup>584</sup>

The author is very clear here. Subrogation in the price applies only if the non-existence of the thing is due to a transfer of the original thing; that is to say the replacement of the thing by its value. In all other cases not falling within the subrogation rule, something else must be considered.

There is however one writer, Cláudio Michelin,<sup>585</sup> who directly hints at a nuanced justification as to why there is no such defence in Brazilian law. Discussing very briefly the need of the enrichment to be in existence at the time of *litis contestatio* to succeed in such claims, he compares the provision embodied in BGB § 818(3), which he does not expressly mention as the loss of enrichment defence in German law, but he merely sees the provision as pointing to the need of the enrichment to be in existence at the time the claim is brought. He then observes that ‘the codified Brazilian law did not explicitly opt for such rule because there was no need for it, since the need for the enrichment to be in existence is effectively part of the factual support (suporte fático)<sup>586</sup> of the obligation to

<sup>584</sup> A. Alvim (1954) No. 173 *Revista Forense* 47-67, at 57.

<sup>585</sup> C. Michelin, *Direito Restitutivo* (2007) 196. The writer however does not offer *in loco* any other sources for that proposition (save those I cite in the note immediately below) nor does he make any reference to the ‘*travaux préparatoires*’ or other Brazilian writers that that was indeed the clear position of the Drafting Committee of the ‘Anteprojecto’ in omitting the defence. His conclusion appears to be more of an *ex post facto* inference than one that is grounded on the sources.

<sup>586</sup> This notion of ‘the need of the enrichment to be in existence as constituting part of the factual support of the obligation’ which Michelin equates to ‘loss of enrichment’ remind us the confusion of not distinguishing between establishing the existence of the enrichment in the first place (the onus here is on the plaintiff) and establishing its loss if it existed at some stage (here the onus is on the defendant). Strictly speaking ‘non enrichment’ is not synonymous to ‘loss of enrichment’ because when one asserts there is ‘non enrichment’, the assertion goes to the root of the claim itself. As explained in the South African section on ‘loss of enrichment’ above (see item 2.6.1.), to equate ‘non enrichment’ to ‘loss of enrichment’ manifests an opaque interface between a defence *strictu sensu* and factors that cohere to the claim, but in

restore an enrichment *sine causa* itself'. Afterwards he adds that the provisions of arts. 238-240<sup>587</sup> of the CC serve such function because 'they regulate a series of cases in which the existence of the enrichment may be doubted and such provisions offer solution for such cases'. He continues by explaining that art. 238 establishes 'that the *total* disappearance of the object giving rise to the restitutionary obligation, if it occurs without the debtor's fault, implies an *ex-lege* 'termination' of the obligation'.<sup>588</sup> 'If the disappearance occurs after the debtor is put in *mora* (which can take place either by notice or even by a judicial action), then the rules applicable in other cases of *mora* will ipso facto apply'.<sup>589</sup>

I discuss Michelin's view in detail further below.<sup>590</sup> For the time being it suffices to say that, in my view, the justification advanced by Michelin cannot fully account as plausible explanation for the 'omission' of the loss of enrichment defence. It can hardly be said that the provisions he cites account for most situations of enrichment acquired at the expense of another in the absence of any justification. Because of certain contradictions with the provisions of articles 884-886 of the new CC, I partially cast doubt on it.

Michelon also mentions in the same heading arts. 479(2) and 480 of the Portuguese Civil Code that he considers as being to the same effect as the German BGB § 818(3). In

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respect of which the onus of proof lies upon the defendant. That is the case because for the plaintiff to substantiate his claim he must establish that the defendant was enriched, which creates a presumption of enrichment; and once the plaintiff has done that, the onus of overcoming this presumption falls upon the defendant. Thus, as said earlier, at one level of the analysis one may refer to this as a defence of 'non-enrichment' but in reality it concern facts that are part of the constitution of the claim itself and not extrinsic to it. But it is plain that whenever loss of enrichment defence is accepted in a legal system, it is thought of as a 'positive defence' because it relates to facts extrinsic to the constitution of the claim. The claim must first be ascertained to exist, and thereafter the defendant assert that the enrichment no longer exists or the 'circumstances have changed' (as the Americans put it) and therefore he should be exonerated from the liability to restore it.

<sup>587</sup> Full translation of these provisions is offered further below, and in Appendix II at the end of the thesis.

<sup>588</sup> Art. 238 reads: 'If the obligation to restore a certain thing, and this thing, without the debtor's fault, is lost before the transfer (*traditio*), the creditor shall 'suffer' the loss, and the obligation will be terminated, save his rights up to the date of the loss'.

<sup>589</sup> Such rules according to the writer 'are notably those applicable in cases of impossibility even if arising from fortuitous events or *force majeure*' provided for in art. 339 of the CC. Art. 240, according to the author, establishes that the impossibility arising from the debtor's fault results in damages (*perdas e danos*). Hence, the writer concludes that in such a situation an enrichment claim transmutes itself into a delictual (tort) claim ['transmute-se daqui o regime da obrigação restitutória em um regime de responsabilidade civil'].

<sup>590</sup> See the discussion at item 4.3.2.1.

addition he mentions three writers, two French (François Terré and P. Maularie et al) and one Italian. The Italian mentioned is coincidentally the same Paolo Gallo to whom I have referred elsewhere as advocating both the need of a direct application of a change-of-position defence in Italian law and the curbing of the subsidiarity requirement to bring Italian law in par with other powerful countries.<sup>591</sup> In my view, while the ‘existence’ of the enrichment is a requirement envisaged both by the German BGB and the French, Portuguese and Italian laws, the equating of BGB § 818(3) to art. 479(2) and 420 of the Portuguese CC is inaccurate. Portuguese law does not expressly have loss of enrichment as a specific defence.<sup>592</sup>

Apart from the possibly ‘limited recognition’ of loss of a enrichment defence by cross-reference as suggested by Michelin, the best that can be said, in my view, is either that the defence per se is not recognised under Brazilian enrichment law, or if it can be said somehow to have been recognised by inference, the approach followed is that such a defence is only applicable in situations analogous to the doctrine of impossibility of performance under a contractual obligation. The mere fact that a defendant has relied upon the receipt and parted voluntarily with the benefit in reliance thereof, will not exonerate him from liability if the benefit received may still exist. The view advocated by Michelin, however, scores a vital point here, because it clearly tells us that there must be a ‘total’ disappearance of the object for the obligation to terminate *ex lege*. Therefore, Brazilian enrichment liability is clearly focused entirely on that which was received by the defendant, and it considers the loss of the received value in isolation from the rest of the defendant’s assets,<sup>593</sup> and any other loss that might appear causally connected to the enriching fact is to be disregarded entirely.

<sup>591</sup> For references see the conclusion of my Article on Subsidiarity to appear in due course in *Columbia Law Review – New York* (Spring 2010). (For the time being the manuscript is obtainable from the writer).

<sup>592</sup> See the lengthy discussion offered by J. M. Vieira-Gomes, *O Conceito de Enriquecimento* (Porto 1998) Chapter XIV (p. 817-851) in which the Portuguese author discusses a series of German, English, American writers on ‘Desaparecimento do Enriquecimento’ and in no single instance he refers to art. 479(2) and 480 of the Portuguese Code as being the equivalent of that notion.

<sup>593</sup> See the explanation given by Pontes de Miranda (*Tratado de Direito Privado: Parte Geral*, Vol 26 (1959) 167) on this aspect namely, that a complete enrichment law has also to take into account what is happening in the defendant’s assets and not consider the duty to restore the benefit received without that consideration, because if that were the case, the law of enrichment would be viewing the subject restrictively by thinking that all cases of enrichment are linked to (or entail) a ‘payment’. See also D. P.

The objective approach sanctioned under current Brazilian law, if Michelin is right, would then seem to manifest a legal system that eschews ‘net enrichment’, that is to say, it sanctions a specific type of change of position in that the loss of the item received itself, which indicates that it is based on the premise that enrichment is specific and that it should not be concerned with ‘net enrichment’.<sup>594</sup> In addition, the approach might equally indicate that the law of unjustified enrichment is mostly conceived in terms of recovery of distinct ‘pieces of property’ (*certa res*) that the defendant holds at the expense of the plaintiff at the time when the claim is raised. The claim conceived in this manner would seem to lie for the return of the specific object that was transferred and probably plus its ‘fruits’ and ‘additions’. Because of the interactions of the various manifestations within this formulation of the aspects emanating from the old Roman ‘*condictiones*’, the general right of restitution of that which has been acquired at plaintiff’s expense must logically also include an obligation to restore an exact amount of money (*certa pecunia*) received by the defendant under certain circumstances. Support to this position can indirectly be gleaned from the very organization of the section of the Code from which Michelin deduces his conclusion. In fact art. 238 of the new Brazilian CC, which he thinks can be fully equated to BGB § 818 (III), is indeed in a section denominated “das obrigações de dar coisa certa” (on obligations to give a certain thing), while arts. 243-246 are part of the grouping identified as “das obrigações de dar coisa incerta” (on obligations to give an uncertain thing). But it will be mentioned later in detail that art. 238 and the provisions immediately following it appear in a section of the Code dealing with the “obligation to give”, and not on the section on “enrichment sine causa”, and only incidentally and even then, only with difficulty can they be related to enrichment liability in general.

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Visser, *Unjustified Enrichment* (2008) 731-732 noting and expanding on this observation in other legal systems.

<sup>594</sup> Apparently similar approach has been proposed for the new DCFR (Draft Common Frame of Reference) for a European Civil Code, Book VII – Unjustified Enrichment, presented to the European Experts on Mach (2009). Note that the DCFR was presented to the European ‘experts’ as a whole, and not only Book VII. For general assessment and initial criticisms of the DCFR see Horst Eidenmüller, R Zimmermann et al “The Common Frame of Reference for European Private Law—Policy Choices and Codification Problems” (2008) 28 *Oxford JLS* 659-708. See also the Whittaker Report, commissioned by the Ministry of Justice, United Kingdom, “*The Draft Common Frame of Reference: An Assessment*” (November 2008).

In any event, in whatever way one reads the provisions of the Code it is clear that some of the difficulties that might have led the writers who hinted at, but did not develop and articulate clearly a full blown defence of 'loss of enrichment', would seem to be the difference that Pontes de Miranda identified between the structure adopted in the Beviláqua Code and those of other jurisdictions, i.e, the exclusive adoption of the *condictio* based approach in that Code which only provided for 'undue payment' while other Codes at the time already spoke of 'unjustified enrichment'. In the reasoning of Pontes de Miranda, when the emphasis is placed on undue payment, the legal system looks exclusively at the 'pending assets' (*patrimônio pendente*), while if the weight is placed on unjustified enrichment, particular attention is paid to what is happening in the assets of the receiver. In this sense, according to the writer, 'the thinking that all cases of restitution (*repetição*) are linked to a payment is avoided'. For example, asserts the author, 'restitution (*repetição*) of that which was given as a donation, or the restitution due to the extinction of a credit *sine causa* is not a restitution of a payment; the reason for such restitution is that 'there would be no *causa solvendi*'. From there the author concluded that the cases provided for in the then arts. 964-971 of the 1916 Code (now arts. 876-883) represented but one form of the *condictio*. The principles envisaged applied *mutatis mutandi* to other species as well, according to the writer. Today we can safely say that 'these other species' represent all cases of enrichment *sine causa*, as recognised by the new Code. Thus, if on the construction of a coherent doctrine of unjustified enrichment, due regard is also had to what is happening to the assets of the receiver, and if such a receiver is in good faith or other legally recognised reasons are present that might justify a different outcome, it is just one step from recognizing that one cannot ignore the possibility of an 'unjust depletion' of the defendant's assets in the calculation of the measure of enrichment. This is the same as to say that change-of-position (or loss of enrichment) could possibly be a general defence to all unjustified enrichment claims in the Brazilian law now that both manifestations of an enrichment claim are sanctioned – the *condictio* approach represented by the chapter on 'undue payment' (arts. 876-883) and the *actio de in rem verso*, represented by the provisions on 'enrichment *sine causa*' (arts. 884-886).

In this chapter, divided in three parts, I attempt to analyse in the first part the structure and the content of the Brazilian enrichment law as a whole under the new Code in order to provide a glimpse of some of the underlying principles and issues. Thereafter, I proceed in the second part briefly to discuss some ordinary defences to the enrichment claim itself which do not appear in the title on enrichment in the Code and I try to provide an explanation for that absence. The defence of change of position (loss of enrichment), though directly absent from the provisions of the Code, is nonetheless discussed given traces that either resemble of it or manifest the need for it. The discussion of this defence is an exploratory journey with a twofold objective: First, it serves to make accessible to non-Portuguese speaking scholars and readers the treatment of the field as a whole under current Brazilian law; and secondly, it seeks to stimulate the Portuguese-speaking scholars that in the future might like to study the field to clearly articulate why their legal systems do not seem to need an explicit change-of-position (loss of enrichment) defence in the face of the recognition of a general enrichment principle. Other situations that may lead to apparent windfalls to the defendant are also discussed, though very briefly.

Because the general purpose of the study is a comparative analysis of change of position defence, which does not appear on the face of it recognised under Brazilian law, but, on inference, it seems to be applicable or being applied in a nuanced manner under certain provisions of the Code, this chapter contrasts the objective and direct application of the defence in the other four jurisdictions<sup>595</sup> presented in chapters two and three above with the seemingly indirect and subtle application of a change-of-position defence in certain scenarios when the need arises in a system that has recognised a general enrichment principle, but omitted objectively the general defence. The chapter starts by offering an overview of the Brazilian enrichment law as a whole, and incidentally discusses the contentious application of an unqualified subsidiarity rule that might be hindering an objective recognition of a general defence, and other ancillary issues. The study does not discuss the provisions of the Code one by one, but as a whole, except where there is a

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<sup>595</sup> The reader is reminded that the jurisdictions under discussion include Canada, United States of America, England and South Africa, apart from Brazil.



need to do so for some underlying apprehension on the provision itself or due to the novelty of the matter. Finally, the chapter deals with the ‘controversial’ appendage of the notion of ‘updating (adjustment of) the monetary value’ to the general principle of enrichment *sine causa* under the new Code, and infers from that, among other things, another potential head of the applicability of loss of enrichment defence. Part three, which is mostly in connection with the contentious addition of ‘updating the monetary value’ to the general principle and its potential effects, identifies specific ‘flash-points’ as peculiar messages that Brazilian enrichment law relays, so to say, to other jurisdictions in the context of the enrichment law doctrine as a whole. The passing-on defence under Brazilian law is discussed alongside the other four jurisdictions in examination in chapter five.

## **PART I – STRUCTURE OF THE BRAZILIAN ENRICHMENT LAW.**

### **4.2. *Nomenclature, Subdivisions and Related Issues. The Trio Structure.***

As it was said in the introductory chapter to this dissertation, the new Brazilian law of enrichment in general is captured under the umbrella title of ‘atos unilaterais’<sup>596</sup> (unilateral acts) in the new Civil Code 2002. This general description has been somewhat differently formulated than in the 1916 Civil Code, which treated the same subject matter under the heading of ‘obrigações por declaração unilateral da vontade’ (obligations arising from unilateral declarations of the will). The old description seems to have been influenced by the then predominant notion of quasi-contract in this area of law (under the influence of the French codification). The nuanced use of the expression ‘declaração unilateral da vontade’ subtly reveals some contractual similarities that were mostly described as ‘obrigações por declaração bilateral da vontade’ (obligations arising from bilateral declaration of the will). However, despite the vital change, the central idea still remains the same: every legal aspect that is captured under enrichment liability or institutes akin to it is treated as though emanating from a unilateral act. Thus, the new

<sup>596</sup> For the appropriateness or otherwise of the choice for the heading ‘unilateral acts’ see C. Michelon *Direito Restitutivo* (2007).

Code collects under the new heading four different categories of ‘unilateral acts’, viz, the promise of recompense,<sup>597</sup> *negotiorum gestio*, undue payment and enrichment *sine causa*. The choice of the heading ‘unilateral act’ is also a clear manifestation of the legislature’s desire to differentiate these subjects from matters arising from contract, for, under the general principles of contract the manifestation of the free will of two or more parties immediately comes into play in assuming the obligation that is capable of triggering a legal response. What motivated the legislature to assemble undue payment, enrichment *sine causa* and the like under the heading of ‘unilateral acts’ is the fact that *prima facie* the obligation deriving from all of them is imposed by law and it does not depend upon the will of any of the parties. Hence, for example under promise of recompense,<sup>598</sup> the law imposes on the promisor the obligation to fulfill the promise, according to art. 854 of the new Code.<sup>599</sup> Although the treatment of recompense can reveal some minuscule features of an enrichment liability, enrichment law proper commences with the *negotiorum gestio* and grows progressively in importance until it is stated in a general principle.

<sup>597</sup> Several academics are unhappy for the drafters to have brought ‘promise of recompense’ under this title. A handful of others also criticise why *negotiorum gestio* was brought in here. Such was for example the view held by Caio Mario da Silva, author of the 1964 ‘Ante-Project of the Code of Obligations’ (O Anteprojeto do Código das Obrigações) who tried again to include the institute of *negotiorum gestio* between the Contracts. However, the Revising Committee altered that orientation and adopted that which appeared more preferable under modern understanding of the institute. In effect, the project of the Code of Obligations assigned an autonomous title to *negotiorum gestio*, treating it as a source of obligations (art. 841ss). I think the former view has more substance than the latter, as almost every legal system recognises that enrichment liability often arises also from managing another’s affairs, though without a mandate.

<sup>598</sup> The concept of promise of recompense is described as the act of someone that, by public announcement directed to an indeterminate person, undertakes to gratify whoever fulfills a certain condition or performs certain service. In these circumstances, it is obvious that the promisor undertook of his own free will the obligation and as soon as someone from the general public or the class to which the announcement is directed fulfills that condition or undertakes the service, the law will impose upon the promisor the obligation to fulfill the undertaking.

<sup>599</sup> The choice of the scheme also manifests another vision that permeates the whole new Code, somewhat contrasted with the previous Code, i.e., - under the new Code the law is expected to fulfill a social function and the interests of the society at large. The treatment of promise of recompense has its intricacies and complexities. Among issues that may raise complex analysis are the revocability of the promise and its relationship with the binding aspect that was alluded to earlier; the possibility of the act or the service required being realised by more than one person, or where the promise of recompense assumes the character of public tender in which various bidders will compete for example for the price, and thereby the *negotium* assuming an aleatory nature with the possibility of both (two people) winning and thereby being conferred the prize or being defeated and thereby suffering losses.

#### 4.2.1. *The Tripartite Division*<sup>600</sup> *and its Underlying Ideas.*

Despite the treatment of promise of recompense in the same ‘title’, enrichment law proper under the new Code commences with the treatment of the notion of *negotiorum gestio*,<sup>601</sup> and grows progressively from there until it is stated in a general principle of enrichment *sine causa*<sup>602</sup> after consideration of its ‘undue payment’ aspect. This trio shares various elements in common but also each one of them has its peculiarities.

##### 4.2.2.1. *Negotiorum gestio* (Art. 861 to 875).

Because *negotiorum gestio* only manifests features of enrichment liability when it presents itself in some instances akin to the forms of the old Roman *actio negotiorum gestiorum contraria*<sup>603</sup> (when it is the claim of the *gestor* against the *dominus*) and occasionally instances of the old form of the *actio negotiorum gestorum directa* (the claim of the *dominus* against the *gestor*), it is only briefly discussed here. *Negotiorum gestio* is normally understood as the voluntary administration of another’s affairs without a mandate,<sup>604</sup> which supplies the reason for placing it amongst the unilateral acts.<sup>605</sup> In

<sup>600</sup> See introductory note to this chapter at item 4.1.0 for the use of the tripartite division in this study and my preference of the dualistic approach.

<sup>601</sup> For a recent treatment on *negotiorum gestio* see C. Michelin *Direito Restitatório* (2007) who devotes half of this book to this notion (pages 38-126).

<sup>602</sup> While *Negotiorum gestio* is dealt with from Art. 861 to 875, ‘undue payment’ is dealt with from Art. 876 to 883 and ‘enrichment *sine causa*’ from Art. 884 to 886.

<sup>603</sup> See C. Michelin (supra) (2007) 58-59. For the treatment and conception of *negotiorum gestio* in common law and its current nuances as well as in old Roman law and the development in the European *ius commune*, see the discussion in this thesis in chapter 1 above.

<sup>604</sup> For the treatment of Mandate under Brazilian law, see among others S. Rodrigues, ‘Do Mandato Tácito’, *Revista dos Tribunais*, No. 191/ p. 579.

<sup>605</sup> C. Michelin, *Direito Restitatório* ((2007) 30) thinks that these three institutions were brought together under the title ‘unilateral acts’ because the new Code adopted as foundation of ‘restitutionary law’ the principle of ‘static conservation of patrimonies’, and not because they manifest the common feature of ‘unjustified enrichment’ should the law not intervene, while admittedly he acknowledges that many other Brazilian writers think that that is indeed the case because all such institutions manifest features of enrichment *sine causa*. He also denies that art. 884-886 of the new CC have their foundations on principles of ‘equity’ and ‘justice’, not because of its falsehood, but because, he says, that ‘equity, morality and justice have little explicative value’ (p.31-33), but again in fact many Brazilian textbooks and case law (jurisprudence) assert that the general principle of enrichment *sine causa* is indeed founded on equitable

contrast, undue payment, which is discussed immediately below, is often said to be nothing more than a species of the general notion of enrichment *sine causa*. Because by administering another's affairs without a mandate the party doing so will have conferred a benefit to the 'owner' which he did not request, or did not agree to have, but the owner might nevertheless have had his assets enhanced with such benefit or they might have been prevented from depletion, and thus an unjustified enrichment claim could theoretically be made out if he refuses to compensate the *gestor*. The approximation of *negotiorum gestio* to an enrichment claim was already evident under the old Code, because under the old provisions, whoever administered another's business was under a duty to restore to the owner of that business everything he acquired in such administration, regardless of what the cause was, subject however to the need to prove that were the owner in the same position as the *gestor*, the outcome of that administration would have been the same, that is to say, he would either have made the same profits, or the same loss, as the case might have been. The foundation of *negotiorum gestio* in the old Code and the new Code remain the same, varying only in nuances.<sup>606</sup>

#### 4.2.2.2. Undue Payment (arts. 876-883).

Undue payment is the subject matter dealt with under arts. 876-883 of the new CC. These provisions have remained virtually unchanged<sup>607</sup> compared to what was already in the 1916 Code. The discussion that follows does not deal separately with each provision but briefly runs through the underlying principles, issues and structure of the institute. As pointed out above, not all writers agree as to the specific characterization of this institute, whether it is a self-standing or is it a species of general enrichment *sine causa*. Sílvia

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foundations as the provisions just cited are nothing but the manifestation of the Roman *actio de in rem verso* even if they have been now elevated to a higher principle of generalization and systematization.

<sup>606</sup> For a detailed discussion of the issue see C. Michelin, *Direito Restitatório* (2007) 39-129.

<sup>607</sup> The few changes made are the explicit inclusion of the obligations to do in the scope of the institution (art. 881) and the possibility under art. 883 of payments effected to attain unlawful, immoral or prohibited aims to revert to charities.

Rodrigues,<sup>608</sup> for example, succinctly characterises the notion of undue payment in his treatment of the Brazilian law of enrichment under the new Code as a species of the general enrichment *sine causa*. He says that on a teleological perspective undue payment is just a chapter of the wider concept of enrichment *sine causa*.<sup>609</sup> As a species of the wider notion<sup>610</sup> it shares not only its main features and manifestations, but presumably also the mechanisms of resisting such claims. In his brief treatment of the historical development ‘do pagamento indevido’ (undue payment) from the Roman *condictiones*, he acknowledges that the ‘*condictiones sine causa*’<sup>611</sup> – as he generically calls all the *condictiones* – arose as a reaction against a system of abstract acts, for, on the one side, they were meant as a corrective mean imposed by equity in order to avoid that an act could produce consequences different either from the parties’ will, or from the law, or else different from good morals.<sup>612</sup> After describing the *condictiones* one by one, the author finally remarks that ‘in all other cases in which no specific *condictio* could be found, but equity imposed the restitution of the undue payment, it was certainly possible to have recourse to the generic idea of *condictio sine causa* to demand restitution’. Hence, it is obvious from this analysis that the author, like many other Brazilian writers, recognises that the foundations of enrichment law lie greatly on equitable principles.<sup>613</sup>

<sup>608</sup> Direito Civil, 29th ed., Vol. 3: Dos Contratos e das Declarações Unilaterais da Vontade (Editora Saraiva, São Paulo, 2003) 409-410.

<sup>609</sup> ‘O pagamento indevido constitui no plano teleológico, apenas, um capítulo de assunto mais amplo, que é o enriquecimento sem causa. Este representa o gênero do qual aquele não passa de espécie’.

<sup>610</sup> See however C. Michelin, *Direito Restitutivo* (2007) 128-129 discussed below.

<sup>611</sup> I believe that the author described the Roman *condictiones* in this way for brevity sake, as there is a detailed analysis of the Roman *condictiones* one by one in the Brazilian legal literature done mostly by Pontes de Miranda in *Tratado de Direito Privado, Parte Especial*, Vol. 26 (1959) 131-155 though it would appear that the orientation of the discussion is essentially based on German legal literature.

<sup>612</sup> Rodrigues, Sílvio (2003) 410-411.

<sup>613</sup> J. M. Carvalho-Santos expressed the same idea in the following terms: ‘A equidade a nosso ver, é o fundamento do não lucupletamento à custa de outrem’ (We are of the view that equity is the foundation of the idea that no one shall be enriched at another’s expense’ (Código Civil Brasileiro Interpretado: Direito das Obrigações, Vol. XII, 13th Edition (1988) 382-383. C. L. Gonçalves, *Tratado de Direito Civil Vol. 4* (1957) 607 also supported the same view when he says that there is no precise theory to justify an enrichment action other than the classic principles of justice and law *suum quique tribuere, neminem laedere* (dar a cada um o seu, e não lesar ninguém), because these principles do not reflect anything else other than rules of equity. Rodrigo Xavier Leonardo indirectly arrives at the same conclusion in his discussion of causality in the ‘transmission of goods’ in the Brazilian law as he remarks that ‘given that the *negotium jurídico* on disposition of goods is directly related to the diminution of the active patrimony of the transferor in order to increase the assets of the receiver, causality must be seen as the rule and not the exception, mainly because the [Civil] Code in operation, explicitly and generally proscribes the enrichment *sine causa* according to art. 884’ (R. X. Leonardo ‘Cessão de Créditos: Reflexões sobre Causalidade na Transmissão de Bens no Direito Brasileiro’ (2005) 42 *Revista da Faculdade de Direito da UFPR* 133,

There is no way of escaping from that conclusion, and the idea of equity emerges in the various formulations adopted to describe the various instances in which a reversal of enrichment is required. Cláudio Michelin,<sup>614</sup> however, disagrees with this position and says that undue payment cannot be seen under the current Brazilian law as simply a species of the wider notion of unjust enrichment. He attempts to give several explanations, amongst which the difference in the prescription regime under undue payment and those under enrichment *sine causa*, as well as the difference in the form each 'institute' determines the consequences of the action. In sum, he says that the relation is not that of *genus* and species, but as that of a general rule and an exception to the general rule. Unfortunately he cites no other Brazilian writers supporting such a view on this point, and therefore it cannot firmly be said that such position is the entrenched Brazilian view of the law. Be that as it may, the distinction between 'undue payment' and 'unjustified enrichment' (denominated enrichment *sine causa* in the current Brazilian Civil Code) is once again a certain manifestation of the 'Pothier School' to which I made reference earlier, though admittedly more attenuated than the difference on the measure of enrichment. In the same way that there is no unanimity about the measure of enrichment, there is also no unanimity about the relationship between the 'undue payment' and the enrichment '*sine causa*' in some legal systems as well. Adopting Pothier's presentation, the French Civil Code and those codes that in one way or another originally modelled their enrichment law on the French configuration, deal with the '*paiement de l'indu*' (*condictio indebiti*) quite extensively and tend to see it as 'completely separate' from the other forms of enrichment. Thus the new Dutch Code, for example, devotes nine sections to 'undue payment' (*onverschuldigde betaling*)<sup>615</sup> (art.

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150). This analysis reveals that the Code throughout its structure emphasises the notion of justice and equity and whenever justice would not be served, such as in circumstances that would enrich one person at the expense of another without a justification the law must offer a redress.

<sup>614</sup> *Direito Restitutivo* (2007) 128-129.

<sup>615</sup> Sections 6:203-211 *BW*. These provisions are generally considered as '*betaling*' (payment) but their scope differs significantly from the one encountered in the old Dutch Code which corresponded with the concept in the French Civil Code. Thus, under the new Dutch Code the concept of 'payment' is wider; it includes a payment of money *strictu sensu*, as well as other forms of benefits such as, for example, transporting a stowaway or dredging a harbour, where restitution in kind is impossible. (See M.W. Scheltna 'Restitution and Mistaken Payments' in E.J.H. Schrage (ed) *Unjust Enrichment and the Law of Contract* (2001) 90). In contrast, in French law a benefit will only be regarded as a 'payment' when something, a property or a sum of money, is given which can be restored in kind (see for example Ghestin and J. Billiau & M. Billiau, 'Répétition de l'indu' in *Encyclopédie Dalloz*, Répertoire de Droit Civil IV

6:203-211 *BW*) before it deals with other cases of unjustified enrichment’;<sup>616</sup> the Québec Code Civil<sup>617</sup> also follow similar lines ((*CCQ* arts. 1491-1492 - undue payment) and (*CCQ* arts. 1493-1406 - unjustified enrichment)). However, the current language of arts. 876-883 in the Brazilian Civil Code seem to have adopted a wider view of ‘paiement de l’indu’, though maintaining the dichotomy ‘undue payment’ and ‘enrichment *sine causa*’, as the legislative intention was to depart from the restrictive position embodied in the 1916 Code.

While art. 876 of the new Brazilian Civil Code imposes upon the receiver (*accipiens*) the duty to restore what he has unduly acquired from the payer (*solvens*), the right of the *solvens* under this article is not to be construed as an unlimited one, for art. 877 immediately adds a caveat that whoever has voluntarily paid what was not due, is under the obligation to prove that he has done so by mistake.<sup>618</sup> The reading of art. 877 obviously suggests that there may be two kinds of problems in this area of the law. First, there is the issue of an undue payment that has been performed involuntarily and, secondly, the need to prove an error in case the performance was voluntary. Where the payment or performance was rendered involuntarily, a few problems turn upon the issue, though it must still be distinguished between an involuntary performance due to coercion and one devoid of it, or where sometimes the degree of coercion does not necessarily vitiate the performer’s will. In spite of some divergences in the classification of what degree of coercion impairs totally a free will, it is nonetheless safe to say that the degree of coercion does not necessarily vitiate the performer’s will if such a coercion is what is usually termed as relative or compulsive (or still moral coercion) for such coercion reduces the freedom of the ‘actor’ (*o coagido*) but does not eliminate it altogether; hence the adage *coactas voluntas, semper voluntas* used in these circumstances.<sup>619</sup> But where

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(Dalloz, Paris) no. 4. Consequently a benefit such as stowaway or dredging an harbour would not qualify as ‘payment’ under French law (i.e. not claimable under *répétition de l’indu*). In such a case it is only possible to claim the benefit under the action de *l’enrichissement sans cause*’ as recognised by the *Boudier* case. In essence, if one looks at Brazilian law with Michelin’s, the position advocated is the same as that still prevailing in France. If that is the case, then the change operated under the new CC is cosmetic.

<sup>616</sup> Section 6:212 *BW* – this is the ‘unjust enrichment’ clause in Dutch law.

<sup>617</sup> *CCQ* = Code Civil de Québec. (Québec Civil Code).

<sup>618</sup> ‘Art 877 – ‘Aquele que voluntariamente pagou o indevido incumbe a prova de tê-lo feito por erro’.

<sup>619</sup> Where there is a mere threat to use the course of the law in order to exact a performance from an existing right, such a threat does not qualify as coercion that renders a performance null and void. See art.

coercion is absolute or ablative the performer is reduced to a mere automaton and any resulting act by him performed is legally considered as null and void, i.e, non-existent, or more technically it is an act *sine causa*. However, where the performance occurred voluntarily and free from any sort of coercion, it is the duty of the performer to prove that he has done so by mistake.

#### 4.2.2.2.1. *Mistake: Nature and Assessment of Error.*

As in many other jurisdictions, the notion of mistake has received some extensive coverage under Brazilian law. The erstwhile debate<sup>620</sup> about error of fact and error of law has presently been overcome, and both are nowadays admissible under art. 139(3) of the new Code. It is generally acknowledged that an error produces in the performer a false conception of the reality and its invocation does not frustrate the applicability of the law, as long as such an error, if of law, is substantial, and it is the sole or the principal motive for the performance – be it a payment or any other juridical *negotium* - to have occurred. There still subsist some nuanced difficulties as to whether in the assessment of a mistake of law consideration should be given to the notion of excusability as is done in the assessment of an error of fact. It is sometimes argued that such a requirement strengthens the applicability of the law, since the complainant alleging to have been mistaken is

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100 of the 1916 Code. This article in the Brazilian Civil Code also influenced the revision of the approach in the Portuguese law that now provides under Art. 255 (3) of its Code the theory invoked by M. Andrade that ‘não constituiu coação a ameaça do exercício normal de um direito’ [The threat of a normal exercise of a right does not constitute coercion] (See generally C.A. Mota-Pinto, *Teoria Geral do Direito Civil* 3<sup>rd</sup> Edition (Coimbra 1986) 529).

<sup>620</sup> The debate persisted throughout the Project and up to the eve of the approval of the new Code and was epitomised by the position defended by Professor Couto e Silva against that of José Carlos Moreira Alves among others. (It is to be remembered that Professor Couto e Silva was one of the collaborators in the drafting Committee as evidenced by the Speech of Miguel Reale presenting the new Code). In sum while Couto e Silva objected to the position adopted by the Project holding that the error of law would ultimately be confused with error over legal effects, the position of Moreira Alves, which finally won over, is inspired by the Italian Code (art. 1429(4) and others) and holds that the error of law must be substantial and that will be the case ‘if such error was the only motive or the principal reason for the transaction (or the *negotium*) and it does not result in the negation of the application of the law’. For more details on the issues see José Carlos Moreira Alves *A Parte Geral do Projecto Código Civil Brasileiro* – [1986] 45-55; P.G. Gonet-Branco ‘Em Torno dos Vícios do negócio Jurídico – A Propósito do Erro de Fato e do Erro de Direito’ in D. Fraciulli Netto et al, *O Novo Código Civil: Estudos em Homenagem ao Professor Miguel Reale* (2003) 129-146; M.M. Monteiro, *Erro de Direito e Causa Falsa no Negócio Jurídico* (1998).



required to show that he applied all possible due diligence.<sup>621</sup> There is also a suggestion that the onus of proof in the assessment of such diligence should be more rigorous when an error invoked is that of law compared to the standard required when the error is of fact, because of the importance of the laws.<sup>622</sup> In addition to the above, there are some nuanced vestiges of a penal nature in some unjustified enrichment provisions in special laws. That is the case, for example, in the Consumer Code enacted under Lei No. 8.078 of 11 September 1990 which provides under the caveat to art. 42 (parágrafo único) that ‘a consumer billed for an undue quantity has a right to restitution of that which was not due, in an amount equal to double of that which he paid in excess, increased by a monetary correction (adjustment) and legal interest, save in the case of an hypothesis of a justifiable mistake’.<sup>623</sup>

The notion of the plaintiff’s duty to prove that he has acted under mistake is in line with the main holding that where the performer has transferred the assets or paid voluntarily and conscientiously, his act is to be understood as a free act with the concomitant consequences attaching to it. However, where such act is incapable of being classified as a free act, it may still reflect the so-called notion of an innocent simulation<sup>624</sup> that encapsulates and hides within it a donative intent approach.<sup>625</sup> That being the case, it is

<sup>621</sup> See P.G. Gonet-Branco (supra) 146. See also S. de Salvo-Venosa, *Direito Civil: Parte Geral* 3rd Ed. (2002) 428-436.

<sup>622</sup> Ibid.

<sup>623</sup> Artigo 42- da cobrança de dívidas. ‘Na cobrança de débitos, o consumidor inadimplente não será exposto a ridículo, nem será submetido a qualquer tipo de constrangimento ou ameaça.

Parágrafo único – ‘O consumidor cobrado em quantia indevida tem direito à repetição do indébito, por valor igual ao dobro do que pagou em excesso, acrescido de correção monetária e juros legais, salvo hipótese de engano justificável’ (emphasis added)..

<sup>624</sup> See for example Jorge Americano, *Ensaio Sobre o Enriquecimento Sem Causa* (SP, 1932); S. Rodrigues (2003) 413.

<sup>625</sup> Simulation as a legal concept is understood as the the practice of an act or a *negotium* that hides the real intention. It occurs when the parties do not ‘want’ the *negotium* that they show to everyone; they only want to produce an external appearance, a semblance of truth, an illusion of the existence of the affairs to third parties, but in truth there is a opposition between the declared and the intended affairs. There are different categories and classifications of simulations, namely: innocent simulation and malicious simulation, relative simulation and absolute simulation depending from which point of view the situation is accessed. If simulation is seen from the perspective of good faith and bad faith, then the important categories are innocent simulation and malicious simulation. In innocent simulation the ‘declaration of affairs’ does not harm anyone, and it is therefore tolerated. And as such innocent simulation does not lead to the annulment of the act, because it does not cause troubles to third parties; therefore the Brazilian legal order does not consider such simulation as a defect per se. When the ‘simulated’ defect is unmasked the *negotium* will be valid, as long as it is not contrary to law or does not harm third parties. In the case of malicious simulation,

obvious that in these circumstances the law comes clearly to the help of whoever has paid by mistake, avoiding in this way and for equitable consideration that he be unjustifiably impoverished. In order to benefit from the protection of the law, the victim is obliged to prove the error; in other words, where a performer alleges that he has voluntarily performed an undue obligation and that the law should come to his assistance in obliging the receiver to restore to him what was unduly performed or unduly transferred, the onus falls upon him to prove that he has done so by mistake. Failing to do so, the courts will not come to his assistance. It is, however, to be noted that there is a reversal of onus of proof in the Consumer Code, which for practical and special reasons, was enacted to counter a general trend in the industry.

#### 4.2.2.2.2. Alternative Analysis: Voluntary Performance and Involuntary Performance.

Seen from a different angle of analysis, i.e. that of the aggrieved person claiming restoration of an 'enrichment', the Brazilian law of enrichment clearly distinguishes two species of enrichment liability, which have traditionally been termed as 'prejudicado voluntário' and 'prejudicado involuntário' (an aggrieved person who has performed voluntarily or involuntarily). First, if the factual scenario in which an enrichment claim is based reveals that the aggrieved person acted voluntarily, having he so acted, the other party's enrichment deriving from such an act will *prima facie* be deemed as justified, and therefore no enrichment claim will be entertained, because the voluntariness of the act constitutes the cause or the justification of the said enrichment. Secondly, if the factual scenario in which an enrichment claim is based reveals that the aggrieved person acted involuntarily, or the act sustaining the transfer was that of a third person, or the enrichment being claimed resulted from an unilateral act of the enriched person himself, the enrichment will *prima facie* be deemed as unjustified or *sine causa*, and therefore an enrichment action will lie.

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however, there exists an intention to harm or cause damage by using the simulatory process (art. 162(2) new *Código Civil*). The effects are therefore different from the innocent simulation. (See generally S. Silva Venosa, *Direito Civil – Part Geral* (2006).

#### 4.2.2.2.1. *Voluntary Performance.*

Voluntary performance, as noted above, presupposes a justified enrichment and, for that reason, no claim will lie. It is, however, to be noted that in the first factual scenario, the existence of the cause precluding the action is a deemed exclusion only, because such a cause may well have been invalidly or ineffectively concluded, in which case an enrichment action will be entertained. The action will equally be entertained in the first factual scenario where a validly concluded '*negotium*' was made dependent upon the happening of a future event and such event failed to happen (here it is said that there was indeed a cause, but such a cause was dependent). Finally, an enrichment action will also be entertained under the first factual scenario where the aggrieved person acted voluntarily, but the objective envisaged for such act ceased to exist, and thereafter there is no cause (this is the *condictio ob causam finitam*). Examples that fall under this last category are cases in which an insurance contract that has been validly concluded, the aim of which was to insure against robberies and burglaries. If the event insured against happened, and the insurer having duly indemnified the insured, but latter the insured recovers the assets stolen from the thieves, an enrichment action will lie, in the form of *condictio ob causam finitam*. Were it otherwise, the insured would be unjustifiably enriched at the expense of the insurer through the so-called 'double recovery'. Another example where an enrichment action will be considered is in the case of contracts of lease or services validly concluded, where advance payments have been made, but such contracts are later rescinded or cancelled. Here the performance rendered under the contract must be restored to the payer; otherwise the payee would be unjustifiably enriched at the expense of the payer. As in other jurisdictions, there is some debate here whether the action in this factual scenario is indeed contractual or an enrichment action. In the cases of bilateral contracts, if the counter-performance becomes impossible, without fault of either of the parties, an enrichment action is also considered, save some qualifications.

#### 4.2.2.2.2. *Involuntary Performance.*

As to the '*prejudicado não-voluntário*', in which case the enrichment is *prima facie* deemed as unjustified and ordinarily an enrichment claim is *ipso facto* expected to lie, that will indeed be the case if the act transferring the enrichment was that of a third party who is not in law able or allowed to validly transfer an enrichment or an asset to the enriched person. In the same vein, an enrichment action will lie where the act that brought about the enrichment was that of the enriched person himself and was not performed in the exercise of a right conferred upon him by the law, or such an act was illegal, or objectively contrary to law and had no foundation in any existing factual debt. For example, if Y has stolen X's car and has since sold it to C, an unknown person, under Brazilian law it is possible for X to institute an enrichment claim here against Y for the value he received for the car or, alternatively, an action for damages (*pretensão de indenização*). There is a possibility of concurrence of actions, but this view is not universally shared in the Brazilian doctrine,<sup>626</sup> nor is the jurisprudence on the issue uniform. It was recently held in respect of the whole enrichment law, and in particular of art. 886 of the new Civil Code which *prima facie* seems to proscribe a concurrence of actions, that such art. does not preclude the right to restitution of what was the object of an enrichment *sine causa* in cases where the alternative means conferred upon the aggrieved person encounter obstacles of fact.<sup>627</sup> Therefore, under this interpretation of the provision, Brazilian law is moving towards the approach that a claim in unjustified enrichment will be available whenever justice requires that a remedy be given for 'property' or 'services' rendered even under a contract and in circumstances where no remedy is available by action on the contract.

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<sup>626</sup> Pontes de Miranda summed his view in this regard as follows: 'Conforme noutros lugares desta obra se diz, an acção por enriquecimento injustificado pode coexistir com outras acções, uma vez que os pressupostos de cada uma sejam satisfeitos. Porque o que há de restituir, por outra razão que o enriquecimento injustificado, se torna, se lhe fica o que teria de prestar, devedor da repetição por enriquecimento injustificado' [As it was said elsewhere in this treatise, an unjustified enrichment action can coexist with other actions, provided that the requirements of each action are satisfied. That is so because he who has to restore to another for a reason other than unjustified enrichment, becomes a debtor under undue payment if he retains what he had to perform]. (Pontes de Miranda, *Tratado de Direito Privado* Vol. 26 (1959) 135).

<sup>627</sup> See C.E. Nicolletti-Camillo et al, *Comentários ao Código Civil De Acordo Com a Lei 11.280/2006* (Editora Revista dos Tribunais (2006) art. 886; See also Enunciado No. 36 – I Jornada de Direito Civil – Conselho de Justiça Federal (11 a 13 de Setembro 2002).

Subtle indicators of the concurrence of actions between an enrichment claim and any other is also seen in the so called ‘enriquecimento cambial injustificado’ (unjustified enrichment ‘cambial’) that was for the first time introduced into the Brazilian law by art. 48 of Law No. 2.044 of 31 December 1908,<sup>628</sup> allegedly a provision of Germanic origins,<sup>629</sup> which held that ‘without thwarting the liability arising from negotiable instruments, a drawer or an acceptor is obliged to restore to the holder, with all legal interests, a sum of which he enriched himself at the expense of the holder. To this end, the action of the holder is the ordinary action’.<sup>630</sup> The possibility of concurrence of actions is manifest in the relationship of this claim and the law dealing with prescription or decadence of a claim. To a certain extent, the concurrence in this respect depends upon the procedural rules in effect at the time. The nature of this enrichment claim, though it has been characterised since its introduction as controversial, is seen as a special application of the enrichment law. It is said that if the action against the drawer or the acceptor has prescribed, there arises an enrichment, and the corresponding action or the

<sup>628</sup> The Decree No. 2.044/1908 is also known as ‘Lei Saraiva’. It continues in operation until today, but it has been supplemented by Decree No. 57.663 of 1966 (Lei Uniform). The new Code has devoted a special Title (Title VII) to such matters entitled ‘Títulos de Crédito’ (Credit Titles) which comes immediately after the Title on ‘Atos Unilaterais’ (Unilateral Acts). For a brief exposition of the various aspects pertaining to Title VII (Titles of Credit) under the new Code, see Carlos Roberto Gonçalves, *Direito Civil Brasileiro: Vol III* (2004) 592-617.

<sup>629</sup> See Pontes de Miranda, *Tratado de Direito Privado: parte geral*, Vol. 6 (1955) 437. Carlos R Gonçalves, *Direito Civil Brasileiro*, Vol. 3: Dos Contratos e Atos Unilaterais (2004) 618. In German law itself this situation is part of the classical conundrum on tri-party cases where “B” (for example a supposed client of a Bank) instructs “A” (the Bank) to pay his creditor “C” in circumstances where “A” and “B” are not linked by any underlying ‘covering obligation’. (See generally a comparative study by Catherine Maxwell, *Aspects of Multi-Party Unjustified Enrichment in South Africa: A Comparison with German Law* (unpublished PhD thesis – University of Cape Town (2006)) 200-203). Here many German authors sustain the view that ‘any enrichment action should lie between the parties to whichever the “Kausalverhältnis” (causal relationship) is defective. Canaris, for example, argues that “B” should sue “A”. That is so because “C” should not be exposed to an enrichment action brought by “A” in such circumstances, because he should not be detrimentally affected by a defect in a relationship to which he is not a party. For Canaris, to expect “C” to suffer the consequences of such defects would be unfair because, unlike “A” and “B” he is not in a position to recognise possible defects or to influence the validity of their underlying relationship’. Koppensieiner and Kramer (*Bereicherung* 25), using the example of the post office man who paid a holder a postal check for which the drawer had no sufficient funds in the account (see *RGZ* 60, 24), also say that the ‘holder should not have to defend himself for a mistake made by an official at the post office’. See equally Larenz & Canaris *Lehrbuch des Schuldrecht: II/2* (1994) 224.

<sup>630</sup> ‘Sem embargo da desoneração da responsabilidade cambial, o sacador ou o aceitante fica obrigado a restituir ao portador, com os juros legais, a soma com a qual se lucupletou à custa deste. A ação do portador para este fim é a ordinária’. In this citation Pontes de Miranda’s reference to ‘ordinary action’ of the holder is to be understood as the normal enrichment action under the general provisions of the 1917 Code, in contrast to a ‘special enrichment action’ (somewhat cumbersome) that was sanctioned under such ‘cambial law’. This ‘cambial law’ is still valid under the new Code, therefore both actions still coexist.

claim arises on this very same day; the period of prescription – which in these cases is three years,<sup>631</sup> – starts to run from the time the claim arose, because *ex hypothesi*, the other action has prescribed, and, in consequence of that, the said enrichment has arisen. If due to lack of protest the possessor has lost his cambial right against the drawer, the ‘prescription’ time starts to run from the day he lost such a right. Whether the ‘author’ can institute the action of ‘cambial enrichment’, in his application for sanctioning the ‘specific cambial action’, if the other action is denied, depends on procedural law, because it is possible to prove that the ‘specific cambial action’ which has not yet prescribed is of no value.<sup>632</sup>

It is also important to know from which date the prescription period in the case of ‘cambial enrichment action’ starts to run so that one can ascertain when the specific cambial action has ceased to exist. If there is still a direct action against any of the persons obliged to perform, inclusive of that against the ‘guarantor’ [avalista] of the drawer or the ‘guarantor’ of the acceptor, or the ‘guarantor of the guarantor’ [o avalista do avalista], the action cannot be instituted. It remains to be known, however, whether the existence of an action dependent upon the cause excludes the possibility of there arising an enrichment action, even if it is against any of the other persons obliged to perform. There is no doubt that the defendant can interpose this as a means for the holder to be indemnified from the occurrence (or to redress his grievance), and the assessment of the diminution of the holder’s assets would not be understandable, without taking into account the subsistence of the positive element such as the existence of a causal element or any other action commonly given in law against any of the persons obliged to perform, provided it is in relation with the title. However, the onus to prove the uselessness of the action *cum causa* or any other action ordinarily given in law as against the one now envisaged falls on the party who instituted the cambial enrichment action.<sup>633</sup>

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<sup>631</sup> Article 206 (3)(iv) of CC 2002.

<sup>632</sup> Pontes de Miranda, (supra) vol. 6 (1955) 437-8.

<sup>633</sup> Ibid. 438.

#### 4.2.2.2.3. *Enrichment other than by Performance.*

While the ‘prejudicado voluntário’ and the ‘prejudicado involuntário’ aspects of the enrichment normally require an active involvement of the aggrieved in the transaction or performance which is the subject matter of the enrichment claim, there exists also a third alternative giving rise to an enrichment situation in which, strictly speaking, there is no act of the aggrieved, but a pure factual scenario (*fato stricto sensu*) or an ‘act-fact’ of someone else (*ato-fato de alguém*) giving rise to the enrichment. In this hypothesis, the enrichment is *prima facie* deemed unjustified if such fact *stricto sensu* (*fato stricto sensu*) or ‘act-fact’ (*ato-fato*) enriches someone, and at the same time it erodes the economic advantage of another person, in situation where the law was not enacted envisaging such an outcome. In this category would fall examples such as the identification of one’s assets in matrimonial cases. Where, for instance, at the end of a marriage in community of property, the personal assets of one spouse increased at the expense of the common assets, or at the expense of the personal assets of the other spouse, the *condictio* in these circumstances will be entertained to avoid that one spouse be enriched to the detriment of the other. In this example it is clear that it is the pure factual scenario (*fato stricto sensu*) that gave rise to the enrichment.

This third aspect, alongside the others, reveals that an enrichment action does not require capacity on the part of either the enriched person or the aggrieved; it is the enrichment per se that founds the claim or the material relation between two patrimonial assets.<sup>634</sup> It is indeed an action imposed by law where the will of parties is not an essential element.

#### 4.2.2.2.4. *Enrichment and Causa: General Observations.*

While the Brazilian law of enrichment proper is mostly premised on the notion of *causa* (but see below the drafting pitfalls on this issue), the law on undue payment does not *prima facie* appear strictly to require such an element, especially where an undue payment is the result of a mistake. There has, however, been some debate as to whether

<sup>634</sup> Pontes de Miranda, *Tratado de Direito Privado*, Vol. 26 (1959) 127.

the notion of *causa* should be generalised, and in the cases concerning mistake some writers have advanced a position that the need to prove an error is an excessive demand on the performer. Some of such authors are of the view that the best approach should be that the performer or the *solvens* need to show only the non-existence of the cause for the payment.<sup>635</sup> Carvalho de Mendonça, for example, thinks that whenever it is proved that what has been paid was not due, the logical inference to be drawn from that fact is that the payment was made by mistake. Hence, in such cases, once the *solvens* has proved the payment and the lack of *causa* for such payment, restitution should follow. The same line of thinking has long also been defended by other continental writers such as Baudry-Lacantinerie.<sup>636</sup> There is no doubt, however, that it is the basis of the Brazilian law that there has to be a justification for any transfer of value. This justification equates to the presence of a legal basis (*causa*). That is because, in the law of obligations in general, the absence of a legal ground creates a restitutionary obligation, either under the rules of undue payment or under the rules of enrichment which is not justified or as now designated in the new Civil Code 2002: ‘sem causa’. Whether one is dealing with the first aspect (undue payment) or the second aspect (enrichment sine causa), or even the third aspect of specific cases of *negotiorum gestio* that lead to enrichment claims, as said earlier, what is at stake is a shift of value (ordinarily monetary value, or other kinds of performances or omissions resulting in one person being enriched at another’s expense), and in order for such shift to stand, it ought to be justified. That being the case, the test to ascertain such justification is always the same: is there a legally sufficient reason for the shift of value? The reason for such a shift must be objective. Such a reason can be a contractual (or other) obligation, a voluntary act or a statutory rule. It is to be observed that often special rules may apply in analysing a reason based on a statute, for in such cases one has to look at the rationale of the relevant statutory rule, i.e., one must enquire whether the rule sanctions the shift of value or not.<sup>637</sup> In any event, once it is ascertained that the rule sanctions the shift, that statutory rule is then perceived as the ‘causa’ for the shift.

<sup>635</sup> M.I. Carvalho e Mendonça, *Doutrina e Prática* Vol. I, p. 488, note 204.

<sup>636</sup> Baudry-Lacantenerie et Barde, *Obligations* (3<sup>rd</sup> ed. (1906) 592.

<sup>637</sup> See for example, art. 165-166 of the Nacional Tax Code (CTN) discussed in chapter 5 below.



I have alluded above to the analysis of enrichment claims from the perspective of the aggrieved person himself and seeing him either as one who has performed as a 'prejudicado voluntário' or a 'prejudicado involuntário'. Such analysis entails that the aggrieved may be a participant in the underlying reason for the shift of value or not be a participant. Where the claimant is a participant in the underlying reason and the shifts of value deriving from such action were initially thought of as constituting a legal obligation (e.g., payments under a void contract), such shifts are considered as made without legal ground if there turns out to be no obligation to be discharged. Voluntary participatory shifts of value, which are made with no sense of obligation, lack a legal basis when the intended outcome is not achieved. Non-participatory (i.e. over which the claimant has no control) shifts of value (e.g., the acquisition of fruits by a *bona fide* possessor)<sup>638</sup> may constitute a legal basis.

But the Brazilian legislature has clearly opted for a different view. What is required is simply that if there was no error leading the payer to voluntarily effect a payment of what was not due, an undue payment action will not be entertained. In addition, Brazilian law considers error widely. It does not matter whether the error was of law<sup>639</sup> or of fact; neither does it matter whether it was excusable or not.<sup>640</sup> As long as there was error in performing an undue payment, restoration of the undue payment must follow.

#### 4.2.2.3. Enrichment *Sine Causa* (arts. 884-886).

##### 4.2.2.3(A). *The Pathway from the Old to the New Code and Some Contentious Issues.*

<sup>638</sup> For a modern treatment of the theme of possession and the acquisition of fruits from a *bona fide* possessor see (Professor Schulz - Conference CAHS, papers delivered at UFPR on 15/08/2007 and his interesting interpretation of Pontes De Miranda's treatises on the issue).

<sup>639</sup> Note however an exception made under art. 849 of CC 2002 (parágrafo único) about error of law, where the issues giving rise to the error were controversies between the parties.

<sup>640</sup> On error of fact or of law see for example the judgments referred to in RT 302/661 in which the courts held that 'não só o erro de fato, mas igualmente o de direito, pode ser invocado como fundamento da *condictio indebiti*'.

The third pillar of the Brazilian enrichment liability is indeed enrichment *sine causa*. Technically speaking this is the enrichment law proper and it is in this area that the new Code differs noticeably from the 1916 Code. While the old Code omitted a general principle of liability prohibiting an enrichment *sine causa*, the new Code has clearly stated this principle. I have alluded elsewhere to the deficiencies of the earlier Brazilian enrichment law under the old Civil Code, based solely on undue payment, which entailed that objectively the Code aligned the whole field as if it were all dependent upon a payment, instead of a more general principle. The new Code partly overcomes that shortcoming and now art. 884 of the new Code provides that ‘whoever has been enriched at another’s expense without just cause shall restore what he has unduly acquired, after updating (adjusting) the monetary values’.<sup>641</sup> A caveat is however added to the provision, namely that ‘if the object of the enrichment claim consists in a specific thing, he who has received it is under a duty to restore it, and, if the thing does no longer subsist, its restitution shall be effected by its value at the time it was demanded’.<sup>642</sup> The provision and its caveat do not give much detail, but it seems almost unquestionable that by negative inference the formulation adopted subtly envisages making a distinction between an enrichment that comes about through a fungible and one that comes about through a non-fungible.<sup>643</sup> These notions seem to be built-in and reflected in the language

<sup>641</sup> Art 884 Civil Code 2002 (Título VIII - Direito das Obrigações – Dos Atos Unilaterais, Capítulo VI ‘Do Enriquecimento Sem Causa’. The article reads in Portuguese ‘Aquele que, sem justa causa, se enriquecer à custa de outrem, será obrigado a restituir o indevidamente auferido, feita a atualização dos valores monetários’. The Code is in effect from 1 January 2003 although some parts are still to enter into effect. Note however that differently from art. 473 of the Portuguese Civil Code 1967 which speaks of ‘sem causa justificativa’ (without a justified cause or better ‘unjustified cause’) [Full text: ‘Aquele que, sem causa justificativa, enriquecer à custa de outrem, é obrigado a restituir aquilo com que injustamente se locupletou’], the Brazilian provision speaks of ‘sem justa causa’ (without a just cause). Note also the different wording of art. 2041 of the Italian Civil Code of 1942 that simply mentions ‘without cause’. [full text: ‘A person who has enriched himself without cause at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss’].

<sup>642</sup> For the implication of the expression ‘its value at the time of the demand’, see discussion below at 4.3.2.

<sup>643</sup> Note however that Sílvia Rodrigues discussing the *condictio indebiti* under art. 876 and 877 remarked that ‘as regard to the *condictio indebiti* there is basically no difference whether the object that has been transferred is a movable or an immovable one, and whether it is fungible or non-fungible. The dispositions of art. 876 and 877 apply to all of them alike. The *solvens* that has transferred an immovable to an *accipiens* on an undue payment can have it restored to him if he proves that he paid by mistake. The parties are returned to the position they had been in prior to the undue payment’. S. Rodrigues, *Dos Contratos e Atos Unilaterais* (2003). This is not in contradiction to what we are saying above, as our emphasis is on the defence to a claim under art. 884 and the measure of the returnable enrichment under such provisions, through a cross-reference to the provisions in arts. 876 and 877 might create a contrary impression. Where

used. The same may be true for enrichment by services rendered, which does not seem to be recognised under any provision. Indeed one must ask what is meant by a specific thing. Is money, under such a formulation, a specific thing? Are shares specific things? Where does enrichment resulting from a performance of services fit into this caveat? Can one interpret the first part of the general enrichment action as solely related to monetary claims because of the expression ‘updating the monetary values’ attached to it, while the caveat (parágrafo único) as related to non-monetary claims? I shall return later to some of these questions.

This provision (art. 884) as a whole is followed by two other articles (arts. 885-886) which form the whole new addition. However, the addition of these three new provisions to the enrichment law does not mean that under the old Civil Code one could not have recourse to provisions of the Civil Code to protect or defend his interest if the case resembled a claim now sanctioned under the general enrichment *sine causa*. The notion was partially covered under art. 964 of the 1916 Civil Code which provided that ‘whoever has received something not due to him, is obliged to restore it’. This provision was followed by an elucidation that ‘the same obligation is incumbent upon someone who has conditionally received money before the condition is fulfilled’.

The main difference however is that the old Code systematically treated the undue payment (*pagamento indevido*) feature of the enrichment law and a litigant could immediately and objectively refer to a clear provision in the law if aggrieved, while he could not do so if his claim were characterised under the so-called ‘*actio de in rem verso*’. The only way a litigant could protect his interest, or the court could help an aggrieved person in the absence of a general principle, was to refer to the general principles of the law (in some instances by analogy) – a technique which is allowed under Brazilian law. Obviously, absent a general principle prohibiting enrichment *sine causa*, the Brazilian legislature still addressed various situations that today would fall under the

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a thing is lost or no longer in existence, there is no way of escaping from the fungibility and non-fungibility analysis to establish its value for the purpose of restitution.

heading enrichment *sine causa* through the generic idea. But such cases had to be very specific.

The main provisions relating to unjustified enrichment under the old Code were art. 964 and 965,<sup>644</sup> and the rest of the provisions went all the way up to art. 971. In addition, the 1916 Code had numerous other provisions scattered throughout its body that could be used in specific instances, either by analogy or because they addressed a specific matter. That was for example the case in respect art. 513 of the old Code which provided the possessor, even in bad faith, with the right to receive the expenses of maintenance and related expenditures, because were it otherwise, the owner would have been enriched without proper legal ground;<sup>645</sup> the same provision also allowed the good faith improver under the rules of *specificatio* to acquire the 'raw-material' that he had modified, but the law under art. 613 imposed upon him the duty to indemnify the owner, because if the solution were otherwise, either of the parties could have exacted an undue benefit: the improver by having acquired gratuitously the raw-material; or the owner by having unduly appropriated to himself the services of the improver without paying for them. An enrichment action could also follow under the provisions of art. 157 of the 1916 Code where someone was entrusted with the administration of the affairs of another and he turned out to be absolutely or relatively incompetent in doing so.<sup>646</sup> In short, it was possible under the 1916 Code to address most of the issues that the new provisions will address through the exercise of skillful cross-referencing of the provisions of the Code.<sup>647</sup>

<sup>644</sup> Article 965 held that 'He who has voluntarily paid what was not due bears the onus of proving that he has done so by error' (Ao que voluntariamente pagou o indevido cumbe a prova de havê-lo feito por erro). This provision is repeated verbatim in the new Code 2002 in Art. 877.

<sup>645</sup> See for this A. Alvim (1957) *Revista Forense* 49.

<sup>646</sup> See Pontes de Miranda *Tratado de Direito Privado*, 2nd Ed. Volume 43, (1963) 195 (§ 4.706)

<sup>647</sup> The cross-referencing under the new Civil Code can already be seen in the application of art. 884 by the courts. For example, this art. (884) is cross-referenced with art. 1832 of the new Code dealing with collation. Current Brazilian jurisprudence has for example held that 'in order to avoid an enrichment *sine causa*, collation – in the law of succession – shall be done based on the value of the bequest at the time of the donation, in terms of the caveat of the Civil Code 2004 (reference to art. 884, caveat which is commented further below in this work), exclusively in the hypothesis that the thing donated is no longer part of the donor's assets. However, if the thing is still part of his assets, collation shall be calculated based on the value of the thing at the time the succession takes effect, in terms of CPC 1014, in order to preserve the quantity that will effectively integrate the legitimate deceased assets when these are amalgamated., i.e., at the time of death' (See Colaço, Valor. in *Jornada I STJ 119*). The whole law of enrichment is also cross-referenced to art. 206(3)(iv) of the new Code dealing with the prescription period of an action for enrichment *sine causa* which is three years.

In spite of all the efforts by the courts to address the issue through general principles and analogy, the doctrine (academic writings) deemed this solution to be inadequate and went on the offensive, demanding that a catch-all provision be recognised, because it found that there was still a possibility that some genuine claims could not be solved under the existing techniques. Amongst the problems that the old Code created was the difficulty to fathom whether the legislator, although it omitted a general principle prohibiting an enrichment *sine causa* in the 1916 Code, nevertheless wanted to proscribe generally all enrichment *sine causa*, or whether such proscription could only be admitted in the specific cases mentioned in the text of the law, such as those cited earlier.<sup>648</sup>

Obviously, under these circumstances there were two currents of thought, the one trying to defeat the other. The first approach was based on the negative position mostly captured under the maxim '*inclusio unius, exclusio alterius*' while the second assumed a positive attitude and is subsumed under the adage '*ubi eadem ratio, idem jus*'. The negative approach, mostly espoused by Clovis Bevilacqua<sup>649</sup> and vehemently defended afterwards by the theorist Jorge Americano,<sup>650</sup> held that given that the Brazilian legislator was aware of similar rules in other jurisdictions and consciously omitted it, this meant that apart from undue payment and the specific cases mentioned in the Code or other legislative instruments,<sup>651</sup> enrichment *sine causa* was tolerated under the then Brazilian law. For Jorge Americano, again, enrichment *sine causa* was nothing more than an informative principle and could not be elevated to the heights of an institute or normative principle. Further arguments advanced to deny the existence of a general enrichment action at that stage were that the number of cases that could fall under such a general action would be very small indeed as most of the imaginable cases were already covered by the existing law in the various provisions scattered throughout the Code or other legislative

<sup>648</sup> See A. Alvim, 'Do Enriquecimento Sem Causa' RT, 259/3 São Paulo (1957); A. Alvim, 'Do Enriquecimento Sem Causa' *Revista Forense* 47ss; S. Rodrigues (2003) 422.

<sup>649</sup> See C. Bovilacqua, *Código Civil, Observações ao Artigo 964* (Code of 1916).

<sup>650</sup> J. Americano 'Essaios...' (Ensaio Sobre o Enriquecimento Sem Causa') p.122 No. 59.

<sup>651</sup> See for example decree no. 24.150, of 20 April 1934 (Lei de Luvas) which expressly mentions unjustified enrichment that such enactment intends to outlaw.

instruments.<sup>652</sup> The negative position drew additional impetus from art. 4 of the Law that had introduced the 1916 Code which held that ‘should there be omission in the law, the judge has to decide the case having recourse to analogy, customs (costumes) and the general principles of law’. The positive view, defended among others by Agostinho Alvim, sustained the idea that the omission under the 1916 Civil Code was a legislative oversight and this lacuna was being addressed by the judiciary through the use of analogy, and if analogy could not work, the issue was dealt with by reference to the general principle of the law, as stated earlier. Carvalho Santos, commenting on the 1916 Civil Code, objected to Clovis Bevilacqua’s view that the omission of the general principle forbidding an enrichment sine causa was not only intentional but also justifiable due to the fact that the various species in which enrichment was present could not be made subordinate to a single unifying principle.<sup>653</sup> Santos thought that the omission, even if not an oversight, was being addressed either by the application of art. 4 and 7 of the law Introducing to the Civil Code, just cited above, i.e.; (whenever there is omission in the law), or it was indeed the *actio de in rem verso* that was being ingeniously applied in practice, despite the difficulty of defining its scope and limits.<sup>654</sup>

#### 4.2.2.3(B). *The Solution under the New Code’ (CC 2002): An Analytical Consideration.*

The new Code, as has been mentioned, enacted the general principle into law by means of art. 884, which provides that ‘*he who is enriched at another’s expense without just cause, is obliged to restore what was unduly obtained, after ‘updating (or adjusting) the monetary values’.*

This new provision emphasises four main aspects: (i) enrichment (ii) without just cause; (iii) at another’s expense (iv) ‘after updating (adjusting) the monetary values’.<sup>655</sup> I will in

<sup>652</sup> J. Americano (supra) p.122-26.

<sup>653</sup> See C. Boviláqua, *Código Civil, Observações ao Artigo 964* (Code of 1916).

<sup>654</sup> J.M. Carvalho-Santos, *Código Civil Brasileiro Interpretado* 13<sup>th</sup> ed (1988) 378-79.

<sup>655</sup> The expression ‘updating monetary values’ is sometimes referred to as ‘correção monetária’.

due course address each of these aspects separately and reveal some of the nuances that might be encapsulated in the formulation.

For the time being, let me consider the addition of the principle to the Code as a whole. Reading the new enrichment provisions as a whole (art. 884-886) it transpires once again that this principle banning unjustified enrichment is in turn based on the principle of higher equity that does not allow one person to gain to the detriment of another without a cause that justifies such a gain.<sup>656</sup> Following in the footsteps of the development of French law, the general enrichment principle encapsulated in the Brazilian law developed through the *actio de in rem verso* and thus far it is only allowed if there is no other judicial remedy available through which an aggrieved person can have a redress, as provided for under art. 886 of the new Civil Code which reads that ‘no restitutionary action for enrichment shall be entertained if the law grants to the aggrieved party other means to redress the loss suffered’.<sup>657</sup> This is the subsidiarity requirement. Brief discussion of subsidiarity and its various meanings was done elsewhere in this thesis.<sup>658</sup> It suffices here to note that there have also always been some voices among Brazilian academics or writers questioning the desirability of such requisite in the Brazilian enrichment law, alongside the mirror-image ‘gain-loss’ or ‘enrichment-impoverishment’ requirement.<sup>659</sup> Recently it was held, for example, that the ‘expression enrichment at

<sup>656</sup> There exist several other views as also A. Alvim recognised when he held that ‘grande número de autores fundam na equidade a condenação do enriquecimento injustificado; outros há que se reportam à ideia de causa; outros aproximam o instituto do enriquecimento do instituto da reparação do dano; outros prendem-se à ideia de equilíbrio de patrimônios; ainda há outros pontos de vista’ [A considerable number of authors base the foundation of the condemnation of unjustified enrichment in equity; others do so based on the idea of causa; others approximate the institute of enrichment to that of reparation of damage (i.e. delict or tort law); others are attached to the idea of equilibrium of assets; and exist many other views] (1957 A. Alvim, ‘Do Enriquecimento Sem Causa’ (1957) *Revista Forense* 51). For a wider treatment of the various foundations of unjust enrichment law, see my conclusion to chapter 2 of this thesis, and further literature there provided (pages 101-105 above).

<sup>657</sup> (Art. 886 – ‘Não caberá à restituição por enriquecimento, se a lei conferir ao lesado outros meios de se ressarcir do prejuízo sofrido’).

<sup>658</sup> See notes 5 and 558 above and note 915 below in the conclusion chapter for issues on subsidiarity. For an in depth treatment of the theme, see my separate publication dealing specifically with such a notion in the law of unjustified enrichment. (Note: The publication mentioned here is to appear in spring 2010 in *Columbia Law Review* – New York, at which time full reference will be available. For the time being the manuscript is obtainable from the writer).

<sup>659</sup> Back in 1954 Pontes de Miranda writing about the action of ‘distrato’ or ‘distrato’ as he sometimes calls it, said the following: ‘Is the restitutionary action the same as that of unjustified enrichment, or that of distrato itself, or both, with a subsidiary character of the latter? If the efficacy of ‘distrato’ achieves the

another's expense of the new Civil Code art. 884 does not necessarily mean that there must be impoverishment'.<sup>660</sup> In the same vein, Cláudio Michelin<sup>661</sup> confirms the general opposition to an unqualified subsidiarity requirement when he refers to the decision of the Commission on the Law of Obligations,<sup>662</sup> which a few months after the enactment of the Code recommended the following:

'Article 884 that deals with the subsidiarity of the right to restitution based on the enrichment *sine causa* does not exclude the right to restitution of the enrichment either in the cases in which the alternative means given to the aggrieved to make up his losses encounter an obstacle of fact which hinders the elimination of the enrichment, or in the cases in which the alternative means offered to the aggrieved appear not to suffice to undo the totality of the enrichment'.

Existing Brazilian legal literature, though scanty on this issue, seems to have quietly accepted it that the new addition is indeed the *actio de in rem verso*. There are still some small variations among writers, but the dominant view is that a claim based on such a action entails the following requirements: (i) an enrichment of the defendant; (ii) an impoverishment of the claimant; (iii) the existence a causal link between the enrichment and the impoverishment; (iv) an absence of cause that justifies the transactions and (v) the absence of any other action for the claimant to gain redress.

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factual support (o suporte fático), or the cause, the action is that of restitution *ob causam finitam*. The same does not happen if the 'distrato' only remains in the sphere of efficacy, - the cause was not achieved; the action here is that of 'distrato'. But there is a third solution: The 'distrato' goes against the effects and achieves the cause: here the creditor would have a choice. The question is linked to the operation that happens with the 'distrato' in the sphere of efficacy, that is, the 'distrato' dissolves (undoes), but it does not resolve, nor does it solve; it does not turn 'E=Zero', it only enunciates that 'E-E', in which moment 'M' corresponds with the action of contract, and post-propositionally leads to 'Zero', and at the same time 'M' corresponds to an enrichment action. If the contracting party that has performed asks his performance, alleging 'E-E', then he exercises the action of 'distrato'; if he asks his performance alleging that 'E=Zero', he left moment 'M' behind him, and anything he demands, it can only be according to art. 964-971 (the enrichment provisions under the 1916 Civil Code), principles which do not always coincide with those that direct a contractual action (there, 'distrato' - according to the author himself) on restitution. There it can be seen how false is the theory of subsidiarity of the 'justified enrichment action', which only accepts it if there is no other action' (Miranda, *Tratado das Obrigações: Parte Geral*, Vol. 3 (1954) 229). I think in this quotation he meant 'unjustified enrichment action' and not 'justified enrichment action', as the text puts it.

<sup>660</sup> See *Primeira Jornada de Direito Civil* (Brasília 2002) No. 35; See also N.N. Junior & R.M.A. Nery *Código Civil Comentado* (4<sup>th</sup> ed) (2006) 592 (revised and updated edition). M.C. Kroetz, *Do Enriquecimento Sem Causa* (2005) 78ff.

<sup>661</sup> C. Michelin, *Direito Restitutivo* (2007) 264.

<sup>662</sup> *Primeiras Jornadas de Direito Civil* - Council of Federal Justice - CJF - (Brasília (2002), Enunciados: (Direito das Obrigações), Item 35 (which deals with art. 884 of the new CC) and item 36 (which deals with art. 886 of the new CC).



The rule that has hitherto been accepted for an action based on improvements namely that the enrichment must be actual, i.e. existent at the time of demand (*litis contestatio*), seems to extend now to the whole field. For an action based on improvements, it has been held, that where such improvements have been done by a possessor and by the time of the *litis contestatio* such improvements no longer exist or have deteriorated, there is no room to speak of enrichment, because there is no increase in the assets of the owner.<sup>663</sup> Put differently, it has always been implicitly accepted that ‘non-enrichment’ in cases of improvements is a ‘defence’ to the claim itself. Though it is not openly acknowledged either by the law (legislation) or in the jurisprudence, the non-enrichment as a defence, is subtly accepted in a wider sense, as we shall see later, and the doctrine has clearly ventilated it in this wider sense, lacking only a systematic consideration of the issue, perhaps obscured and hindered by the subsidiarity requirement. Support for my contention can be found in what Agostinho Alvim fifty years ago described as being one of the essential elements of an enrichment *sine causa* action in his seminal Article published in *Revista Forense*. The author put it this way:

‘Because [in an action for enrichment] what is at stake is restitution for enrichment, and not indemnification for damages, the enrichment must exist at the time of the action. If it existed, but ceased to exist, as a rule, there is nothing to restore. Such hypothesis, however, must not be confused with the substitution of the thing, because, if it does not exist because it was transferred, this will be a case of subrogation in the price’.<sup>664</sup>

The author is very clear here. Subrogation in the price applies only if the non-existence of the thing is due to a transfer of the original thing; that is to say the replacement of the thing by its value.

#### (i) ‘Enrichment’.

The element ‘enrichment’ is an essential requirement in order to establish a successful claim on enrichment *sine causa*. The notion of ‘enrichment’ is to be understood in its

<sup>663</sup> J.M. Carvalho-Santos, *Código Civil Brasileiro Interpretado* 13rd Ed. Vol. 12 (1988) 385.

<sup>664</sup> A. Alvim (1954) No. 173 *Revista Forense* 47-67, at 57.

wider sense. The most frequent form of enrichment is the shift of values from one person's patrimony to that of another. But enrichment also occurs in many other forms such as where one has avoided losses; or where one has avoided using his own things or assets, saving himself expenses. There is also enrichment flowing from the transfer of possession (*condictio possessionis*) or from the remission of a debt or from services having been rendered; or from the acquisition of some moral benefit (advantage) which also has a pecuniary value. There is even enrichment if one's assets have enlarged by incorporation into them of a material or an immaterial element. In sum, the wider sense of enrichment entails any increase of one's assets or any avoided decrease of such assets (a decrease in one's liabilities), and even non patrimonial advantages gained provided they can be estimated in money. The example discussed in the section that follows on monetary adjustments in cases of judicial deposits in times of steep inflation,<sup>665</sup> represents from one angle of analysis a situation in which no direct values have shifted from one patrimony to that of another, because it is not denied that such deposits are to be refunded in the very sums received. The contention that 'unjustified enrichment' in this example arises only because of the perceived difference between the 'numeric value' of those deposits and the 'real value' of the money in the accounts. In other words, the State in this example, by devaluing the currency and attempting to pay the very sums received in judicial deposits in their original 'numeric value (or nominal value)' after some considerable time has elapsed, indirectly decreases its liabilities, and therefore enriches itself, while the depositor is impoverished because whatever he can do with that 'nominal value' is now more expensive, and therefore decreases his acquisitive power. Put differently, the State is enriched by decreasing its potential liabilities and by shifting the burden to the depositor who is impoverished with having a sum in his hands which has less acquisitive power, and therefore extending the time to fulfill any potential obligations sounding in money he (the depositor) might have.

As mentioned above, enrichment can also come about through the performance of services or through a remission of a debt. Enrichment by performance of services has received very scanty treatment under Brazilian law, and examples of recovery under such

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<sup>665</sup> See below, discussion on effects of Law No. 6.899/81 (Indexation Decree); and *REsp. 12.591.0/SP*.

a heading are very rare. In the scanty instances of this kind of enrichment, one sees the enrichment arising therefrom in its end product or in the increase in value that it brought about in an existing property where it is associated with improvements (benfeitorias). It is, however, to be noted that where mistakenly conferred services do not create an end-product, or result in the increase of value of an existing property or discharge of a debt, the only probable remedy which a plaintiff might pursue is the payment for the reasonable value of the services rendered. The reasonable value approach brings the matter somewhat closer to a contractual setting, but concrete examples are very rare and sometimes ambiguous. In any event, it would appear that in ordinary circumstances, requiring the defendant to pay for the reasonable value of services would in most cases leave that defendant out of pocket and thus at a disadvantage compared with his pre-mistaken position. The issue may be of interest for further research.

In short, whether it is stated or not, there is enrichment whenever the right of 'retention' of a benefit would be unjustified, and the related enrichment liability arises where there has been performance in one of the following circumstances for which one expects the associated right: (i) where the performance is the undue delivery of a thing, the claimant has the right to claim the thing as having been unduly rendered; (ii) where it is payment of money, the claimant has the right to claim payment of the same amount; and (iii) where other performances have been rendered the claimant has the right to reversal thereof. A swollen wealth resulting from an omission to perform qualifies in any of the categories above as enrichment if the facts fit it.

*(ii). 'After Updating the Monetary Values' (Monetary Adjustment).*

The expression 'after updating the monetary values' (feita a atualização de valores monetários) is somewhat confusing in the context in which it is used and what exactly it means has not yet been fully tested in the courts. Article 884 was meant to introduce a general enrichment action as a catch-all provision; and yet the provision speaks of 'updating or adjusting monetary values' apparently as the fourth requirement of such a

general action. The use of this element seems to indicate that the enrichment claim provided for under this general action embraces money claims alone and any enrichment that does not fit into the monetary mould is not considered. This observation may be corroborated by the wording of the caveat to the general claim that follows it and which speaks of ‘if an enrichment consisted in a specific thing’ which appears to be there as the opposite of money in the preceding clause. I have highlighted in a footnote above the differences in the wording of the general actions provided for in the Portuguese and Italian Codes which do not use those words. There is a suggestion in the legal literature to the effect that such an expression is related to currency devaluation or inflation in the country as a whole, but the context does not seem fully to support such a wide contention. Carlos Gonçalves<sup>666</sup> who advocates this proposition says that

‘the determination that restitution of that which has been unduly received be effected with ‘adjustment of monetary values’ is due to the fact that jurisprudence (court decisions) has for long manifested that the corresponding monetary value constitutes a mere reposition of the value of the currency weakened by inflation, and its calculation is to be computed from the moment the ‘payment’ (emphasis added) was made, in order to avoid the enrichment *sine causa* of the debtor, rendering irrelevant any delay that might have occurred in the institution of the demand’.

The author, however, does not cite any authority supporting this contention, save a single reference to one court decision,<sup>667</sup> and his discussion of this issue appears in a single paragraph of seven lines. Neither does the author tell us what the facts were in that decision in which such proposition might have been made and how the judge updated the monetary values and the criteria used. Be that as it may, Cláudio Michelin<sup>668</sup> has in the

<sup>666</sup> C. R. Gonçalves, *Direito Civil Brasileiro – De Acordo com o Novo Código*, Vol. III (2004) 588-90.

<sup>667</sup> STJ, REsp 31. 791-MG, 4<sup>a</sup> Turma; Rel. Min. Barros Monteiro; DJU, 22/04/2002, p. 212.

<sup>668</sup> C. Michelin, *Direito Restitatório* (2007) 242. The author says: ‘As regard situation (b) - [at p. 240 – situation in which the value received (which is expressed in money) has suffered a decrease due to currency devaluation. In this case (second case), one must ask whether the obligation to the enriched person also comprises the duty to restore not only the nominal value, but also a reposition of real value, i.e.; a monetary correction] - the provisions of art. 884 seem to make an exception to the general rule in the Civil Code. Art. 315 of the CC determine that debts (owed) in money must be paid in their nominal value. The automatic monetary correction (not agreed upon) is a consequence that the Code ascribes to the non-performance of a pecuniary obligation, with the aim of preserving the purchasing value correspondent to the nominal value at the time of non-compliance (art. 404). The so-called ‘nominalism principle’ that is opposed to the notion that debts have to be paid by the value of the purchase, admits exceptions, such as the possibility of correction of pecuniary value due to the disequilibrium between performances arising from

meantime also adopted the same view as Carlos Gonçalves while commenting on the very art. 884 and cross-referencing it to arts. 315, 317 and 404 of the Code. Furthermore, the observations of Judge Sena Rebouças in an Appeal Court decision in São Paulo (426.304/1 SP) seem indeed to corroborate Gonçalves and Michelin's interpretation:<sup>669</sup>

'Masking the inflationary process (alleging or pretending that it does not exist, institutionalizing the tale of a 'strong currency', but which has always been the same weak currency under a different name), also results in hiding the profits that inflation brings to the State as debtor. The process that once was open is now hidden, but it continues to exist. Inflation is lucrative to the extent that it transfers the assets of the creditors to the debtors. Whenever there is inflation and the fact is ignored for whatever reason (by the law or by the courts decisions), there is a transfer of assets. The creditor is impoverished (decreasing his credit in real value), and the debtor is enriched (decreasing his debits), to the extent of the inflation. The profit is exactly what the debtor (in casu, the depositary) has ceased to pay for a while, postponing his debt without any duty of adjusting it (because in effect, inflation continues), which results in an enrichment sine causa, which cannot and must not pass unnoticed by the Judiciary. The institutionalization of a monetary correction [monetary adjustment mechanism] in judicio is an instrument of justice through which judges and courts correct the distortions that, in the face of inflation, legal and contractual norms bring to the rights of the parties'.

'It is important to correctly establish the concept of monetary correction in judicio (or monetary correction as an instrument of justice), peculiar to the law, although it is of economic origins, or emanating from an economic concept. Monetary correction *in judicio* is an inherent mechanism to the inflationary process, and for that reason it is only possible to conceive the non-existence of monetary correction if there is no inflation. It is not only unacceptable and even contrary to the notion of good faith to establish a 'nominalistic' principle in time of steep inflation, but also it is objectionable to implement any other idea that could hamper and curb the enforcement of monetary correction in this time of inflation, for, such fact would impose the transfer of the above mentioned assets to the benefit of the debtors while harming the creditors'. Yet, the worst that comes from this same situation is the effect of transforming the Judicial Power in the process to be an instrument of windfalls, or, in the best of hypothesis, as an accomplice of what conventionally is called

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unforeseen events that have occurred from the time the obligation arose (art. 317). Thus, art. 884 makes an exception to the 'nominalism principle' because it expressly determines that the value unduly acquired be restored after adjusting the monetary values'.

<sup>669</sup> The whole issue of currency devaluation leading to the assertion of 'adjustment according to inflation' is linked to the economic crisis period and its main features are embodied in Lei No. 6.899/81 which deals with Judicial deposits. The law is also known as the law of indexation.

enrichment sine causa. The non-implementation of a monetary correction (adjustment) mechanism is a profound shock to the general ethical sentiment, and consequently, the suggestion to return the same genuine deposit unchanged represents the idea of returning nothing at all. It would lead to an absurd result, economically indefensible and judicially an aberration, which cannot be sustained. For this reason, it must be ensured that the rules on actualization of values on the sums deposited must be the same as those that are used to updating judicial calculus (assessments), i.e. the use of IPC (CPI – Consumer Price Index), in the periods in which the government plans above cited have modified the system of ‘remuneration’ of savings, mandating the implementation of indexes that did not reflect the reality of inflation. In these cases, jurisprudence has acquiesced, admitting a real correction. The correction, as a ‘ceiling’, is aimed at maintaining the currency at its initial level of acquisitive power, and consequently, it is not an ‘income’. The devolution of an amount deposited must be corrected (adjusted) from the date of the deposit up to the effective date of receiving such deposits’.

Further support for this position can be drawn from the effect that Law No. 6.899/81 (Indexation Decree) may have in the law as a whole. This law is very complex, but we are only interested in those aspects that are relevant to unjustified enrichment. It has been held in a case reported at *REsp. 12.591.0/SP*<sup>670</sup> that ‘the systematic monetary adjustment of debits arising from judicial decisions – sanctioned by Law No. 6.899/81 – constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law’. The court in that decision further held it to be well known that the phenomenon of monetary adjustment ‘is exclusively aimed at maintaining over time the real value of the debt by means of an alteration in its ‘nominal’ (numeric) expression. It does not generate any increase in the value nor does it translate into a punitive sanction. It simply derives from the passage of time under the currency devaluation regime’.

Under the rules sanctioned by such a law in a generally indexed economy,<sup>671</sup> it is said that one must transform any monetary obligations – especially those arising from contractual transactions – into ‘debts in values’ (dívidas de valores) in which the currency serves as a mere indicator of an amount which changes according to pre-established

<sup>670</sup> *REsp 12.591-0/SP* (1ª Turma STJ) (18.5.1992) Relator, Min. Demócrito Reinaldo, in *Boletim Adcoas* No. 138.819]

<sup>671</sup> It is debatable to what extent Brazilian can still be considered as a generally indexed economy; for over time many have argued for its des-indexation to some extent. Therefore the ‘adjustment of monetary values’ under art. 884 of the New CC should be put in perspective with time, if it is indeed correct.

indexes.<sup>672</sup> It is to be noted that, as regard to debts arising from judicial decisions, art. 1 of Law 6.899/81 clearly encompasses all pending payments arising from the unfulfilled obligations, and it mandates monetary adjustments of any pecuniary debt even if there exists no specific contractual provision. In the case of a liquid debt, monetary adjustment is to be undertaken from the time the debtor fell in *mora*, and in all other cases, from the time the judgment was issued. In some instances, obligations undertaken envisaging payment in a foreign currency,<sup>673</sup> the operation itself is normally not invalidated, but the clause that stipulates the foreign currency operation is sometimes considered null and void; although the agreed upon sum between the parties in such agreements still has to be converted into the national currency. In these cases the problem that often arises is to determine the value date for the conversion, whether it is the stipulation date or the payment date. In either hypothesis, there arises the possibility of an unjustified enrichment. While the Federal Supreme Court (Supremo Tribunal Federal (STF)) in such issues has decided that the conversion to the national currency is to be considered from the date of the stipulation (i.e. of the judgment), because, according to the court (Rel. Min. Morreira Alves)<sup>674</sup> a conversion based on the date of the payment would result in an unjustified enrichment (inaccurately labelled as ‘enriquecimento ilícito’)<sup>675</sup> of the creditor, who would benefit from the adjustment of the foreign currency during the duration of the contract, having as basis an invalid act, which is expressly proscribed by Decree No. 23.501/33. Logically, the appealed decision from the TJRJ (Tribunal de

<sup>672</sup> G. Tepedino, *Temas de Direito Civil* 1st ed. (1999) 102-103; 3rd. Edition, (2004) 110-111. There exist official indexes for the adjustment of monetary values emanating from judicial decision debts. Law No. 6.899/81 itself was the product of the then Brazilian high inflationary economy, under the currency known as ‘Cruzeiro’. For further details on these indexes and related matters, specially quotations in foreign currencies see A. Wald, *Obrigações e Contratos* (53); G. Tepedino, *Temas de Direito Civil* (1999) 103.

<sup>673</sup> This issue is based on Decree No. 23.501 of 27/11/1933. This decree forbade in all internal contracts (contracts within Brazil) stipulations and payments in Gold (it is to be remembered that by 1933 the world still operated under the Gold standard) or in other determined kind of currency, other than local currency. This precept exactly originated due to the inflation and the cambial imbalances of the time, which forced the Provisional Government of the 1930 to issue such legislations following other countries. This legislation is still in effect, but over time it has been modified and several exceptions are now made to its provisions.

<sup>674</sup> Foreign readers should take notice that under Brazilian ‘legal nomenclature’ the justice (judge) issuing the judgment is commonly referred to as ‘Relator’ (in brief: Rel.) and the judges or justices at the ‘Supremo Tribunal Federal’ (STF) are referred to as ‘Ministers’ (in brief: Min.).

<sup>675</sup> It is not infrequent that some writers interchangeably use ‘enriquecimento ilícito’ with ‘enriquecimento injustificado’ (sine causa). The confusion occasionally appears also in some judgements, such as in the judgement referred to here.

Justiça do Rio de Janeiro) was equally founded on the principle forbidding an enrichment *sine causa*, but there it was seen from the reverse party. According to the TJRJ the conversion of the sum borrowed in the hypothesis of a loan contracted in a foreign currency, had to be made from the date of payment, in order to avoid an enrichment *sine causa* of the debtor in the face of the devaluation of the national currency while the contract was in operation.<sup>676</sup> Therefore, in whatever way the issue of ‘monetary adjustment’ is seen, it is obvious that it leaves a windfall to one party in the equation, which though it might ultimately be justified (i.e. it is *cum causa*, because of the application of the said Law 6.899/81), it might still be unjust.

Inflation ordinarily is not the work of private citizens, but that of the State or Government. How can a provision aimed at all private persons at large (as well as public bodies) be made dependent upon an act done by the State? While the above interpretation would be adequate where one party is a public body (e.g. depository institutions such as a bank or the like), stretching that interpretation to cover ordinary private citizens has a penal quality, and its universal applicability to any branch of law is questionable.

In order to capture the possible meaning of the words ‘updating the monetary values’, one must analyse the provision as a whole. It says that ‘whoever has enriched at another’s expense without just cause shall restore what he has unduly acquired, after updating the monetary values’. The provision states a general principle and does not refer exclusively to money claims; though its final part speaks of ‘monetary values’; it refers to any enrichment acquired *sine causa*, be it a monetary benefit or a money worth benefit, or any kind of benefit from which the recipient enriches himself at another’s expense. The caveat (parágrafo único) that follows the provision also indicates that if ‘updating monetary values’ were to refer to currency inflation, it would be incongruent with an enrichment consisting in a specific thing for which the calculation of the value of the enrichment, if the thing has been lost or no longer exists, is to be considered from the time the demand is made (*litis contestatio*), and not when the thing was acquired by the defendant. This assertion that the enrichment generally is to be considered from the time

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<sup>676</sup> See generally *Jurisprudência Brasileira* 70/74-78.



of the *litis contestatio* is well entrenched in Brazilian law for, as Pontes de Miranda once put it, ‘what is given in the case of unjustified enrichment is not the value of the thing at the time that the enrichment occurred, but the value of the defendant’s enrichment as it enriches him at the time the action is brought’.<sup>677</sup> The same author elaborated on this view by adding the following example in respect of a specific thing: ‘If the thing had remained in the hands of the claimant would be valued at ‘*a*’, but while it remains with the defendant its value is now ‘*a+x*’, then the value to be restored to the claimant is ‘*a+x*’, save in the cases provided for under art. 966 of the Civil Code 1916’. Article 966 which constitutes an exception in Pontes de Miranda’s analysis, provided as follows: ‘To the fruits, accessions, improvements and deteriorations that have occurred to the thing given in an undue payment, shall apply what is provided for under arts. 510-519 (of the 1916 Code)’. These provisions have not changed that much under the new Code.<sup>678</sup> Rodrigues Filho Eulámpio<sup>679</sup> exemplifies the application of the then art. 966 with reference to a São Paulo court decision reported and commented upon at TJSP, RT 613/96 in which decision it appears that a disputed salary was fixed in a first instance court decision. On appeal, the Court of Appeals reduced the quantum to a lower sum, and of course ordered the immediate restitution of the excess. The loser tried to launch an appeal for a monetary correction of the quantity returned but the court held the appeal to be inadmissible.

The example given by Pontes de Miranda does not detract from the general proposition that in an enrichment claim the measure of the enrichment is calculated from the time of the institution of the action, save exceptions. In this example he is dealing with an existing thing which is still held by the defendant, and while remaining with the defendant, its value has changed from *x* to *y*. Because it is the thing itself to be restored, the proposition does not create any problem. If it is no longer the thing to be restored, but its value and the holder had notice at the time it might have lost, then the measure can

<sup>677</sup> Pontes de Miranda, *Tratado das Obrigações*, Vol. 26 (1959) 167.

<sup>678</sup> The new CC, Art. 878 provides the following: ‘Aos frutos, acessões, benfeitorias e deteriorações sobrevindas à coisa dada em pagamento indevido, aplica-se o disposto neste Código sobre o possuidor de boa-fé ou de má-fé, conforme o caso’. [To the fruits, accessions, improvements and deteriorations that have occurred to the thing given in an undue payment, shall apply what is provided for in this Code about the good faith or bad faith possessor, as the case might be].

<sup>679</sup> R. F. Eulámpio, *Código Civil Anotado* 3<sup>rd</sup> Ed. Revista e Ampliada (Porto Alegre, 2001) 838.

indeed be  $(a+x)$  for in such a case the defendant will be precluded from denying the claim because he has knowledge that the thing belonged to another. From this it can indeed be seen that in some situations of enrichment liability it matters whether the thing received was a fungible or a non-fungible.

In any event, the words ‘after updating the monetary values’ added to the general principle seem to me to reflect the old notion of enrichment liability adopted in the 1916 Civil Code which only considered ‘undue payment’ and made the whole field look as if it were dependent upon a payment, as earlier said. Indeed that seems the message that those words are conveying; that is to say the general principle of enrichment *sine causa* is seen, as if it could only emanate from a performance through payment of money. If that is indeed the meaning to ascribe to the general principle, then, if it is not a limited vision of the field as a whole, it might be another oversight in the drafting style. The later possibility is probably the correct interpretation since no one today holds the restricted view about a general enrichment action that is evident in the first possibility. The Italian provision (art. 2041 of the *Codice Civile*) by which the Brazilian drafters were inspired does not mention any balancing of monetary values in such a fashion. The provision there reads:

‘*General cause of action for unjustified enrichment.* A person who has enriched himself without cause<sup>680</sup> at the expense of another shall, to the extent of the enrichment, indemnify the other for his correlative financial loss. If the enrichment consists of a special thing, the person who received it is bound to return it in kind if it is still in existence at the time of the demand’.<sup>681</sup>

In my humble opinion it would have been better not to attach the words ‘updating monetary values’ to the general enrichment principle, but to have inserted a separate clause dealing with the issue. Each case could have been dealt with according to its

<sup>680</sup> Note that similarly to the Brazilian art. 884 of the CC 2002, the Italian art. 2041 says ‘*senza giusta causa*’.

<sup>681</sup> This Italian general principle is then followed by the subsidiarity rule in art. 2042 which provides: ‘*Ancillary character of action:* An action for unjustified enrichment cannot be instituted if the person injured can exercise another action to obtain compensation for the injury suffered’. For details on the subsidiarity rule under Italian law see footnote 625 above on my separate publication on the topic to appear shortly elsewhere.

merits, but with the benefit of having a clear indication in the Code of a clause authorizing such a mechanism, avoiding in this way the danger of an excessive exercise of discretionary powers by the courts.

A further problem arising from the fact that those words were attached to the general enrichment principle becomes evident from the fact that the structure adopted for the enrichment law in the Civil Code clearly separates ‘undue payment’ – the *condictio*-claim – from the ‘general enrichment claim’ (the *versio*-claim). Under such a scheme, where a ‘*condictio*-claim’ (undue payment) applies’, the ‘*versio*-claim’ (the general principle) does not apply. If that is not the case, why were they separated, and the ‘undue payment’ clauses precede the general enrichment clauses? But when one looks at the practical application of ‘adjustment of monetary values’ which is in the general enrichment clause, it is being applied to ‘undue payment’ factual scenarios alike, and even beyond. The above-cited quotation in *REsp. 12.591.0/SP*<sup>682</sup> illustrates this fact. For this reason, I think that it would have been better if the general principle were placed earlier in the structure of the Code, rather than after the heading on ‘undue payment’.

For the purpose of the theme of this thesis – loss of enrichment - detailed remarks will be made below (Part III of this chapter) showing that the issue of monetary adjustment in unjustified enrichment law may indeed constitute a special manifestation of a change-of-position defence. For the time being, however, it is enough to say that in loss of enrichment situations the defendant is saying ‘I don’t have anymore the enrichment that I once had’, but, in contrast, in situations of monetary correction the plaintiff, by asking for the monetary value to be adjusted, or get it done by the court *mero motu*, is really saying that the defendant has in fact more than he seems to have’. If the defendant has indeed more than he seems to have, on what ground is the plaintiff entitled to that ‘extra amount’?

<sup>682</sup> REsp. 12.591-0/SP (1ª Turma STJ) (18.5.1992) Relator, Min. Demócrito Reinaldo, in *Boletim Adcoas* No. 138.819] - ‘The systematic monetary adjustment of debits arising from judicial decisions – sanctioned by Law No. 6.899/81 – constitutes a real legal principle that is applicable to any kind of legal relationships and in all branches of the law’ (emphasis added).

(iii). *'Without Just Cause'*.

The heading of the general enrichment action (arts 884-886) speaks of an enrichment *sine causa* (enriquecimento sem causa). However the provision itself says that such enrichment must be 'without just cause'. This creates some ambiguity or uncertainty as to what the claim really entails. To speak of enrichment *sine causa* using the language of 'without just cause' can only be understood in a very technical sense. The words 'without just cause' manifest the underlying principle of equity guiding the general enrichment action, and this 'equitable principle' is not strictly compatible with an evaluation of the misplacement of wealth in terms of 'absence of cause'. Mention was made above that this provision of the Brazilian Civil Code is inspired in the Italian *Codice Civile*, arts 2041-2042, as well as several other aspects of the law of obligations in general.<sup>683</sup> It is to be noted however that the Italian provision after mentioning '*senza giusta causa*', also highlights that the object of the claim is an 'indemnity'. Though this aspect of Italian law is also controversial in itself, that is how the legislature put it back in 1942 and it has not been modified since then. Indeed, the difference between 'without just cause' and 'without cause' is extremely relevant and several cases either directly or indirectly underscore this point. The point finds further confirmation in the object of the claim, which is an 'indemnity' under Italian law (art. 2041 of the Italian CC). But in the Brazilian art. 884-886 of the new CC inspired on the same Italian provision, the object of the claim is not an indemnity. When the object of the claim assumes the features of an indemnity, as it is in the Italian case, the claimable value will lie between the impoverishment of the claimant and the enrichment of the defendant so far as the enrichment still exists. That is really the same to say that loss of enrichment is indeed a defence to the claim. In fact, this would be incompatible with a purely *condictio*-based enrichment claim, which, ordinarily, ignores any subsequent change-of-position of the defendant. In spite of Italian law not directly recognizing the general availability of a

<sup>683</sup> See Proceedings of 5<sup>th</sup> CAHS Conference on Pontes de Miranda – UFPR, (Curitiba 12-17 August 2007).

change-of-position defence<sup>684</sup> under the *condictio*-version (undue payment) of the enrichment claim, art. 2037(3) of the Italian CC nonetheless makes an exception, because it bars a claim based on undue payment in cases of the good faith receipt of a chattel which has been destroyed. In such a case, the defendant is liable only in terms of the general enrichment claim under art. 2041 of the Italian CC. Article 2038 of the *Codice Civile* also deals with a curious situation, which could be mirrored in the German BGB § 816(1),<sup>685</sup> namely a triangular situation in which a claimant can claim the thing from the third party who obtained it gratuitously. There the defendant in good faith can raise his own change-of-position (loss of enrichment) as a defence to the claim. As the contract of gift is valid according to art. 769 of the Italian CC (gift is a contract in Italian law, as it is also under Brazilian law, art. 538<sup>686</sup> of the new CC 2002), the defendant is not enriched without a cause when he receives a valid gift. His enrichment is justified, but unjust; so the Italian Code grants an action which is different from that for undue payment. I have mentioned earlier that there is virtually unanimity among the Brazilian writers that the general enrichment action recognised under art. 884 emanates from the Roman *actio de in rem verso* though they differ as to the scope to be given to such action. In the history of the *actio de in rem verso* it is understood that such action originated to allow the praetor to give a remedy where the ordinary *condictiones* did not apply or were to no avail to the claimant.<sup>687</sup> This action is indeed of an equitable nature and time and time again Brazilian writers reiterate this fact.

Due to its equitable nature, the focus is not always on the cause, but it is on justice. The measure of restitution awarded by the praetor in the cases of an *actio de in rem verso* lay

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<sup>685</sup> The provision of the German BGB § 816(1) reads: 'If a person without title to an object makes a disposition of it which is binding upon the person having title he is bound to hand over to the latter what he has obtained by the disposition. If the disposition is made gratuitously the same obligation is imposed upon the person who acquires a legal advantage directly through the disposition' (English translation (1999) *RLR* (1994) 14ff.

<sup>686</sup> Art. 538. 'Considera-se doação o contrato em que uma pessoa, por liberalidade, transfere do seu patrimônio bens ou vantagens para o de outra' (It is considered donation a contract in which one person freely transfers from his own patrimony goods or advantages to the patrimony of another).

<sup>687</sup> See literature in Portuguese on this aspect in the works of Vaz- Serra *Enriquecimento Sem Causa* (1959) No. 3 e 10; and annotations to a case in decided on 31/10/1968 in *Revista de Legislação e Jurisprudência* (1968) No. 102 pp 366ff. Studies in Italian on the issue can be found among others in the works of R. Sacco *L'Arricchimento Ottenuto Mediante Fatto Ingiusto* (1959); P. Gallo *L'Arricchimento senza Causa* (1990).

between the enrichment of the defendant and the impoverishment of the claimant, whereas through a *condictio* the claimant would aim to obtain the value of the entire performance, independently of both the benefit received by the defendant and the actual loss suffered by the claimant. Because the *versio*-claim is an equitable one, it also took into consideration the general situation of both parties, and therefore, the defendant could not be made liable in a 'enrichment claim' under this action beyond the concrete benefit which he obtained from the transfer of wealth and was still present in his assets. Likewise, such claim, in its historical guise, could not exceed the real impoverishment suffered. Finally, this restitutionary action was not triggered by the invalidity of the basis of the transfer, as was the case for the *condictio*.<sup>688</sup> As such, even today, the *actio de in rem verso* might be granted despite the existence of a valid cause, because from the legal perspective, the lack of ground is not necessarily linked to an unfair, or unjust, transfer of wealth. A transfer can be legally sound, but unjust, or even legally unsound, but just. In addition, the *versio*-claim does not require any performance by the claimant, nor need the transfer of wealth occur on the basis of an invalid causa. This action is activated by the violation of general legal principles – rather than legal norms – which is redressed through an evaluation of the consequences of the transfer on both parties. Owing to the fashion in which the object of the claim is assessed, it is unusual for the claimant to recover through the *versio*-claim to the full extent of the benefit received by the defendant. Even rarer will be the restoration of the claimant's assets to the condition in which they were before the claim yielding event took place. The claimant is more likely to receive only that part of the defendant's benefit which at the time of the claim can be

<sup>688</sup> Modern enrichment law in the Civilian tradition in the aspect of a general principle is inspired by the French case *Boudier* (Cassation Civil, 15 June 1892) and subsequent decisions. The head-note in the *Boudier* case states the following: 'As an *actio de in rem verso*' has not been codified and derives from a *principle of equity* (emphasis added), which forbids enrichment at the expense of a third person, it follows that its application is not subject to any specific requisites, and that it suffices that the claimant proves the existence of a benefit which he has procured to the defendant through a forfeiture or personal act'. See further details on the origins of the *actio de in rem verso* and the French *Boudier* case references in A. Varela *Das Obrigações em Geral* 10<sup>th</sup> edition, Vol. I (2000) 497-507; For an indirect patrimonial attribution similar to the one dealt with in the *Boudier* case above, see also the analogous application of the provision of art. 289 (2) of the Portuguese Civil Code 1967 and the annotation of Vaz-Serra to a case in the Portuguese S.T.J. (Supremo Tribunal de Justiça) of 23 July 1974 commented upon in *Revista de Legislação de Jurisprudência* (R.L.J.) No. 110, p 45ff. See equally A. Alvim (1954) *Revista Forense* 47-67 (Sept-Oct). A brief treatment of some of the aspects of *de in rem verso* claim in English law in recent years are dealt with by F. Giglio (2003) 23 *Oxford JLS* 455-482 and R. Gratham & C. Rickett (2001) 117 *LQR* 273-299.

still qualified as existing enrichment. The enrichment which triggers the claim does not have to be unjustified; but it must be unjust.

From the above analysis it is clear that the idea of groundless receipt of a benefit and the idea of injustice do not necessarily overlap. In the case of the *versio*-claim, as now recognised under art. 884 of the new CC 2002, no one will doubt that the injustice of the transfer of wealth is a requirement of the cause of action. And the legal principle lying behind this *versio*-claim is the well known statement expressed by Pomponius in *Justinian Digest* 50.17.206 as said earlier and everyone else recognises.

*(iv) Enrichment 'at the Expense of' Another.*

The requirement 'at the expense of another' does not ordinarily create many problems, though there are a few important issues to be addressed in respect of the so-called 'corresponding impoverishment' approach. Almost all legal systems have moved from the language of a defendant's enrichment 'by the claimant's property' (as it is found in older codes) to the language 'at the expense of another' (as it is found almost in all modern codes).<sup>689</sup> Brazil is not an exception in this regard. Where two people claim from each other, normally the law requires evidence of a correlation between the patrimonial advantage acquired by anyone of them which must translate in the corresponding economic sacrifice or a disadvantage suffered by the other. I have earlier referred to this situation as the 'mirror-image gain-loss' requirement. For example, in the case of *specificatio*, it is understandable that the law will consider the owner of the transformed thing to be the person who has done the work transforming it. In such a situation the enrichment (the gain) acquired by the owner will correspond to the impoverishment (the loss) suffered by the owner of the raw-material. An analogous situation occurs where, for example, a payment has been made to one who has made a cession, after the cession took place but before the payer is notified of the cession, or a situation where a debtor has paid to a creditor after a guarantor has fulfilled the obligation, but without notifying the

<sup>689</sup> See for example the Italian CC, art. 2041; Portuguese CC art. 473; Quebec CC art. 1493-1496.

debtor. In these cases the advantage obtained by the ceding party with the new performance corresponds with the creditor's loss of right over the cessionary, or in the other scenario, the advantage obtained by the creditor with the second payment has the effect of a corresponding loss of right of credit that the guarantor would acquire by subrogation over the debtor. The value that enters into the assets of the enriched party in any of these scenarios is the same as the value that left the assets of the impoverished party. But there are situations in which the correspondence between the enrichment received and the loss suffered is not a requirement to recognise an enrichment liability and there need not be any correlation between the two measures to found an enrichment claim. In this category fall examples such as where someone has transferred a third party's assets, or where someone has generally made use of a third party's thing without authorization. If A uses B's car without authorization while B was on a week long holiday and in B's absence he carried his own workers to a distant building site in that car and at the same time took C's cargos on the way and delivered it to D for a fee during that same week and returned the car to its parking lot without a scratch, certainly A has been enriched at B's expense, because he has both saved himself the costs of paying for the fare of his workers and gained the fee paid by C at B's expense, but it cannot be said that B has correspondingly lost those benefits, as he would never have made them, nor did A's benefits directly come from B's pockets. In this scenario B has his car back in place undamaged. The best he can say to have lost is the tear and wear of his car for a week, if he can prove it, but not the fees A received from D, nor what A saved himself carrying his workers on his car. However, it is not unusual for a legal system in such circumstances to order that A's enrichment be given up to B. This example reflect the frailty of the 'mirror-image 'gain-loss'' that most Brazilian authors still insist must exist to found an enrichment claim. But this position is increasingly being questioned and it is almost obvious that the corresponding loss approach is now defunct.

## **PART II - DEFENCES.**



## PART II - DEFENCES

### 4.3. General Considerations.

With the exceptions of arts 880<sup>690</sup> (exemption from relinquishing one's guarantees), 882<sup>691</sup> (prescription bar), and 883 (illegality bar), all of which appear under the heading of 'undue payment', there are no other defences to be found in the title of enrichment law itself. The title on 'enrichment *sine causa*' does not provide any defences either, except perhaps the limitation of the institution of the claim itself through the subsidiarity rule. There is also hardly any systematic treatment of the defences to unjustified enrichment claims in the doctrine (the work academic writers). Because neither the Civil Code nor the doctrine makes clear mention of the defences to such claims, one is bound to ask why? Certainly defences to such claims, apart from those just cited, do exist. What are they and how to find them? There is no definitive answer, but the following analysis gives a glimpse into the issue. Either one makes a logical analysis of any provision *a contrario sensu* of what it says or does not say and from there infer the defence, or one makes a structural analysis of the Code as a whole. The discussion that follows analyses very briefly the issue of the various defences by means of both techniques, starting first with the inference approach and secondly, to a structural analysis.

#### 4.3.1. Miscellaneous Defences to Enrichment Claims.

Does the existence of another claim constitute a defence? Because in most cases one must arrive at the conclusion by deduction or inference, that is indeed the case. For example by formulating the general principle against enrichment *sine causa* as subsidiary, the logical inference is that the existence of another claim enabling the aggrieved to redress his loss is to be considered as a defence to the claim itself. To illustrate this: where a claimant alleges that the property in the hands of the defendant belongs to him, he can institute a

<sup>690</sup> Article 880 new CC 2002 'Is exempt from restitution of an undue payment whoever that, after receiving it as part of a true debt, has invalidated the title, has allowed the claim to prescribe or has relinquished the guaranties that had secured his right; but he who has paid has the right to a regressive action against the true debtor and his guarantor'.

<sup>691</sup> Old Code Art. 969- 970 and 971. Under the new Code extra articles have been added and the reformulation of some provisions. The wording 'obrigação natural (natural obligation)' has been changed to 'obrigação judicial inexigível' (judicial obligations not 'demandable').

proprietary claim in the form of a *reivindicatio*, and no enrichment claim will be sustained. That is so because in the case of *reivindicatio* it is presumed that the ownership of the thing claimed is not part of the assets of the defendant, while an enrichment claim presumes that the ownership of such property has passed and the thing is now part of the general assets of the defendant. In other words, if someone institutes a claim in the form of a *reivindicatio* he is seeking what is still his; but someone who institutes an enrichment claim is asking what is not his. If the enrichment claim is in the form of *condictio indebiti*, it also supposes error where the performance giving rise to such a claim was voluntary; but an error is never a requirement for any *reivindicatio* claim. In this example, the possibility to institute the other claim constitutes by inference a defence to the enrichment claim.

In some cases, however, the defence is clearly envisaged, though not obviously, stated; in other cases it is stated. A defence which is clearly envisaged by the legislator, but not stated is the case, for example, where there is a need to demonstrate that performance was done by error, which means by negative inference that if the other party can establish that there was no such a mistake, the lack thereof constitutes a defence to the claim itself.<sup>692</sup> Some legal systems would simply call this reality as a defence of knowledge.<sup>693</sup> Another example is the fact that it is almost universally envisaged in an action for unjustified enrichment that the defendant can interpose the illegality or immorality of the act effecting the transfer/transaction as a defence to the claim itself. The new Civil Code under art. 883 clearly precludes a successful claim for undue payment in cases of illegality. The provision states that ‘whoever has given something in order to obtain an unlawful or immoral aim, or a finality forbidden by law, shall have no right to restitution’. This article provides further that ‘in the case of this article, what was given shall revert in favour of a local charity, as the judge will deem fit’. It is therefore

<sup>692</sup> Under current art. 877 CC 2002 it is said ‘Àquele que voluntariamente pagou o indevido incumbe a prova de tê-lo feito por erro’ [Whoever has voluntarily made an undue payment has the onus to prove that he has done so by mistake].

<sup>693</sup> For example that is how it is implicitly also called in South African law where if the claim is founded on the *condictio indebiti* or in some instances on the *condictio sine causa*, and the benefit being claimed is alleged to have been conferred in the knowledge that it was undue, both claims can be defeated by proving such a knowledge. (See *FirstRand Bank Ltd v ABSA Bank Ltd* (2001) 1 All SA 92 (W) 103 E-F). For more details, see chapter two of this thesis – under the heading ‘Loss of Enrichment and Other Defences in South Africa Law’).

doubtless that illegality is always a defence to such claim, and remembering that undue payment is but a species of the general enrichment action, ipso facto illegality is also a defence to the general claim. The illegality defence as such will be dealt with in more detail later in the thesis. For present purposes it is enough to highlight that the issue of illegality is sometimes linked to the *condictio ob causam finitam*, in which case the cause either initially existed or was believed to have existed, and on that supposition or belief performances might have been rendered. Thus, as a general rule, if the person who performed did not know, that with that act or performance he would offend the law, or public policy, he can claim restitution of his performance. It is said that in such circumstances the performer is afforded the *condictio ob causam finitam*.<sup>694</sup> However, if the performer knew the illegality or immorality, or a rule against public policy, or if he performed with the motive of disregarding the law, then, he cannot claim restitution of his performance, because in such a case there is no room for a *condictio ob causam finitam*, as he knew everything from the outset.

Prescription as already referred to elsewhere in this chapter, and in chapter two for other jurisdictions being considered in this thesis, is also a defence to a claim under enrichment *sine causa*. The period provided for under the new Civil Code is three years (art. 206(3)(iv) new CC) for an enrichment action<sup>695</sup> (five under the old code). The rationale for this defence is that the lapse of a certain period of time must put an end to a juridical relationship whose right was not exercised in order to secure social order and peace in the community. Because the law demands that a debtor or whoever is in such a position to

<sup>694</sup> Pontes de Miranda, *Tratado das Obrigações*, Vol. 26 (1959) 145.

<sup>695</sup> See however C. Michelon (*Direito Restitutivo* (2007) 129) who argues that because under art. 206(§3)(iv) the prescription period is 3 years ('the claim to redress an enrichment *sine causa*' [pretensão de ressarcimento do enriquecimento sem causa] and under the provision of art. 205 the prescription period is 10 years ('prescription starts to run in 10 years if the law did not fix a lesser period' [a prescrição ocorre em dez anos quando a lei não lhe haja fixado prazo menor] (which the author ascribes to cases of undue payment), it must be inferred from there that the legislator did not envisage undue payment to be a mere species of enrichment *sine causa*. One must however note that though the words 'ressarcimento de enriquecimento sem causa' are used in art. 206(3)(iv), Brazilian jurisprudence and the doctrine uses 'enriquecimento sem causa' interchangeably when dealing with undue payment cases (*the condictiones*) as well as cases falling under the *actio de in rem verso* and even enrichment resulting from 'negotiorum gestio'. Another term used interchangeably with 'enriquecimento sem causa' is 'enriquecimento ilícito' (see for example the cases discussed under the term 'monetary adjustment' below). Therefore, the interpretation that 'enriquecimento sem causa' in art. 206(3)(iv) encompasses only the claims under art. 884 CC in exclusion of undue payment, cannot lightly be accepted, as there is nothing said in the Code that excludes the contrary interpretation.

fulfill his obligation towards a creditor and allows the creditor to make use of the necessary means to receive what is due to him, if such a creditor were to remain inert for a long period of time, and such inertia were now to establish a juridical situation contrary to his right, such right will be extinct. To perpetuate a right in such circumstances would generate uncertainty in social relationships and disturb public order.<sup>696</sup> However, not all rights are subject to prescription for special reasons, but this is not of much interest for our purposes. Furthermore, there has always been a controversy under Brazilian law whether prescription extinguishes the action or more properly and directly the right itself. This controversy, too, will also not be dealt with here, save to say that normally it is the right to institute the action that is extinguished and not the right itself. Prescription acts against the inertia to institute the action. The right can indeed survive the action. The right is, however, affected by prescription, because, once the action is no longer exercisable, the right *ipso facto* becomes inoperative. The fact that the law in certain circumstances admits the payment of a prescribed debt, precluding a restitutionary action,<sup>697</sup> illustrates the correctness of this interpretation. Another example appears from arts. 61 and 62 of the so called 'Lei de Cheque' (Lei No. 7.357 of 2 September 1985) in which a right survives an action. Under these provisions, if the titles of credit that have prescribed do not authorise an 'executive' action, such titles survive prescription, for they can be demanded by an ordinary action of enrichment *sine causa*.

Likewise, *res judicata* is also a defence under Brazilian enrichment law, as it is recognised that 'no enrichment claim shall lie where a positive judgment affirmed the cause of the enrichment'. It is however to be noted that similarly to the Canadian *res judicata* defence discussed in chapter two of this thesis,<sup>698</sup> there is a qualification in the application of this defence. The general approach is that, if the effectiveness of the judgment is not concerned with the alleged fact, such issue may be dealt with, and a

<sup>696</sup> For a detailed account of prescription and decadence under the new Civil Code see S. de Salvo-Venosa, *Direito Civil: Parte Geral* Vol. 1 (2003) 611-645.

<sup>697</sup> Article 882 new CC 2002 (art 970 old CC 1916) 'Não se pode repetir o que se pagou para solver dívida prescrita, ou cumprir obrigação judicial inexigível'. (There is no restitution for what was paid to solve a debt that has prescribed, or to fulfill a judicial obligation not 'demandable!' [*inexigível*]). Note that this formulation of 'judicial obligation not 'demandable' controversially replaced the notion of 'natural obligation' that was in similar article under the Code of 1916.

<sup>698</sup> See chapter 2 above (Canadian law) at item 2.4.4.

request for the return of the enrichment may be made – such an application (request) may or may not be deferred, in conformity with the presence of the cause or the lack thereof (e.g. an ulterior resolution, a decree of nullity or voidness, after a declaratory judgment).<sup>699</sup>

While one is able to infer several defences through what the provisions say or do not say themselves, the result may not be so encompassing as to explain the absence of some defences in some titles or chapters of the Code.

A careful observation, however, seems to indicate that the general absence of defences under the law of enrichment itself as codified may be a deliberate choice of a legislative approach. It would appear that one of the reasons is the general organization of the Code itself that is structured into a general part and special parts,<sup>700</sup> or, as others would call them, general principles and special principles. With this legislative approach it is

<sup>699</sup> For a concrete application of the defence of *res judicata* and additional problems it has recently aroused, in relation to the effects on an incidental declaration of unconstitutionality over a 'acto jurídico perfeito' (= 'res judicata' in this context) in tax matters and judicial deposits, see the effects of Decretos-Lei No. 2.445/88 and 2.449/88 found unconstitutional by the STF (Supremo Tribunal Federal) and the consequent enactment of Resolution 49 of 9/10/1995 by the Senate (Senado Federal) suspending the execution of such Decree-laws and the subsequent enactment of Provisory Measure No. 1.209 of 28/11/1995, which has since been successively re-enacted. Such measure determines in art. 17(1) that 'instruments of fiscal execution of debts arising from norms considered unconstitutional 'shall be dealt with under a Court order, with notice to the 'Procurador Nacional da Fazenda' (National 'Director' of Finance), save the existence of residual values related to debts legally demandable'. (See more details in the discussion of this laws in G. Tepedino, *Temas de Direito Civil* (1999) 449-457 and corresponding section in the 2004 edition).

<sup>700</sup> Professor Miguel Reale as Supervisor of the 'Revising and Drafting Committee of the Civil Code' in the Speech presenting the new Civil Code said: 'I received in 1970 from the collaborators the proposals corresponding to each area to them entrusted, according to a structure previously agreed upon which comprises a General Part, as conceived by the genius of Teixeira de Freitas, and five Special Parts, referring to the Law of Obligations, the Law of Enterprises, the Law of Things, Family Law and Law of Succession. I am pleased to see that the structure adopted from the start resisted all criticisms to the Draft (o Anteprojecto do Código Civil), save the aspect related to the Law of 'Sociedades Anônimas' [Business Entities] - basically Company Law -, to which we kindly assented, to be separated from the Civil Code and be treaded in a Special Law, that is more apt to deal with such a matter due to the continuous dynamism of stock markets' ('Sanção da Lei que instituiu o Novo Código Civil' in Ives-Ganda et al, *O Novo Código Civil: Estudos em Homenagem ao Professor Miguel Reale* (2003) 18. Note that Teixeira de Freitas mentioned in this quotation was the First Drafter of a Brazilian Civil Code in 1800s that was never adopted in Brazil, but inspired the Civil Codes of Argentina and other South American countries. The speaker mentions amongst the collaborators in the Drafting Committee the name of A. Alvim, whose reference I made earlier in the contention between the negative and positive approaches to the omission of a general enrichment action in the previous Code. Thus, the views of this member are heavily reflected in the area of enrichment law in the new Code.

believed that what is treated in the general part indirectly or by inference covers any claim that may arise in the special parts, unless it is specifically excluded. Therefore, in the study of the defences in the whole Brazilian law one must be alert to this fact and look in the general part to discover what applies to the claims in the special part and what does not apply, and what is specifically excluded. This legislative approach was also followed under the 1916 Civil Code. For example, extinctive prescription in the old Civil Code was treated under arts. 161-179, located in the general part, while acquisitive prescription – generally termed as ‘*usucapião*’ – was treated in the special part under the law of things. These defences are now treated under arts. 205ff (general part) for extinctive prescription and arts. 1.230 - 1.244 for acquisitive prescription (special part). In this example extinctive prescription is of a general application throughout the Code and unless a provision of law specifically excludes it, it applies to any claim or action. Acquisitive prescription, however, applies only to the specific cases to which it is provided for, i.e.; to the law of property. With this legislative approach it is further understood that any new legal rule, even if it only concerns a claim which is in the special law, it is included in the general part of the Civil Code, if such a claim belongs to the private law. In short, the structure requires a skilful cross-referencing.

#### 4.3.2. *Loss of Enrichment (Change-of-Position) Defence.*

Loss of enrichment (or change-of-position) per se as a defence to enrichment claims is not mentioned under Brazilian law. Neither the Code, nor the jurisprudence and the doctrine speak of this mechanism to resist such claims. But a more detailed analysis leads me to conclude that its omission might be mostly *per incuriam*, perhaps due to the deeply entrenched, but dubious notion of subsidiarity, rather than a very conscious decision to leave it aside.<sup>701</sup> Traces of it subtly appear in the formulations used in drafting some articles of the Civil Code dealing with unjustified enrichment. It must be remembered that the drafters felt the need to remain faithful to the Roman tradition, and structured the whole law of unjustified enriched using the dual structure *condictio* and *actio de in rem*

<sup>701</sup> A caveat on this assertion is made in the note that follows explaining the reasons advanced by Michelin.

*verso*. The lack of a general enrichment principle in the previous Civil Code, along with the direct omission of a general defence to enrichment claims there, indirectly influenced the doctrine not to pay adequate attention to such defence in a wider context,<sup>702</sup> and it appears the doctrine confined most of the cases that resemble this defence to the treatment of ‘immovable’.<sup>703</sup> For example when the doctrine freely accepts and the courts sanction it that ‘in this institute (enrichment *sine causa*) the role of fault is very limited, serving only to guarantee that he who has been enriched in good faith does not restore more than the subsisting patrimonial enrichment’,<sup>704</sup> what else could be meant by ‘*enriquecimento patrimonial subsistente*’ other than that the loss of an enrichment in good faith where the enriched person had all along assumed that the enrichment was his to keep, is a good defence to the claim?

<sup>702</sup> I am aware that C. Michelon (*Direito Restitutivo* (2007) 239-240) mentions that all the instances addressed under BGB § 818(III) are dealt with in the Brazilian law by the provisions of the Civil Code provided for in art. 238-242, which read:

**Art.238**—If the obligation to restore a certain thing, and this thing, without the debtor’s fault, is lost before the transfer (*traditio*), the creditor shall ‘suffer’ the loss, and the obligation will be terminated, save his rights up to the date of the loss.

**Art.239**—If the thing is lost due to the fault of the debtor, the debtor shall answer for its equivalent, plus the losses and damages.

**Art.240**—If the thing that must be restored deteriorates without the debtor’s fault, the creditor must receive it, as it is, without any right to be indemnified; the provisions of art. 239 shall be applicable if it deteriorates due to the debtor’s fault.

**Art. 241**— In the case of art. 238, should there be any improvement or addition to the thing, without any labour or expense of the debtor, the creditor shall take the benefit, without any obligation to indemnify.

**Art. 242**—If in order to effect the improvement or the addition, the debtor has done some work, the case shall be regulated by the norms of this Code that deal with improvements done by a good faith or bad faith possessor. **Parágrafo único:** As regard the *fruits* received, the provision of this Code on good faith and bad faith possessors shall apply. (Emphasis added).

The difficulty however in accepting fully that explanation is that such provisions deal with obligations to give an exact thing which does not seem to derive from a context of enrichment *sine causa*. The author also appears to equate ‘loss of enrichment’ under BGB § 813(III) with ‘impossibility to restore in *natura*’ alone. Finally, once again the author does not refer to any other Brazilian writers supporting such position or a case in which that interpretation was applied. In almost all the few pages (pages 239-249) devoted to the ‘quantification of the value when the restitution is impossible in *natura*’ and collateral issues, the author hardly mentions any reference or if there appears any, they all seem from foreign textbooks and foreign writers. For these reasons, though the author might have a valid point, it cannot be said without more that the justification he offers is the prevailing position under Brazilian law.

<sup>703</sup> I will exemplify further below in a footnote this subtle and apparent application of change of position defence to ‘immovable’.

<sup>704</sup> See (infra) the full sentence (of M.C. Kroetz, *Do Enriquecimento Sem Causa* (2005) 77) in which this expression appears.

The caveat to art. 884 above transcribed<sup>705</sup> also lends support to the idea that loss of enrichment can indeed constitute a defence to the claim, because by saying that ‘if the thing does no longer subsist, it shall be restored by its value at the time of the demand’,<sup>706</sup> it must be inferred from that proposition that if the value of the thing at the time of the ‘acquisition’ differs from its value at the time of the demand, the negative difference between the first value and the second value is not restorable, therefore it is to be seen as a ‘lost enrichment’. Here become obvious the German idea that if the defendant were also be required to ‘restore’ that value he would indeed have to dig into his own assets to make up that difference. If that were to be allowed, the claimant would be enriched at the defendant’s expense, or the defendant would have to be considered as if he were the claimant’s insurer. This conclusion is, however, an inference made from the hypothesis that the legislature envisaged the negative difference in such cases, which is more logical and more probable than the opposite. But because the provision does not expressly say so, one must also consider the positive difference between the first value and the second value, i.e. where at the time the demand is made the thing being claimed is more valuable than it would have been at the time it was ‘lost’ and acquired by the defendant. Here the analysis is more intricate, for if the thing still subsists one can directly restore it to the ‘owner’ as it is<sup>707</sup> and no need to inquire into its market value, provided it has not been intentionally or negligently damaged or altered. But because the thing is no longer subsistent, one must inquire into its market value to determine its real value at the time of the demand. How does one determine such market value? Is it the market value of the thing when it ceased to exist or the market value of the thing when it is demanded? The language of the provision suggests that it is the latter and not the former; but this interpretation may raise certain problems where the market value of the thing at the time it is demanded is higher than at the time it ceased to exist.

<sup>705</sup> For the sake of easy referencing, I transcribe again the text of the full caveat here: “Art. 884—*Parágrafo único*: ‘If the object of the enrichment claim consists in a specific thing, he who has received it is under a duty to restore it, and, if the thing does no longer subsist, its restitution shall be effected by its value at the time it was demanded’.

<sup>706</sup> ‘(...) se a coisa não mais subsistir, a restituição se fará pelo valor do bem na época em que foi exigido’.

<sup>707</sup> See art. 240 of the new CC. [**Art. 240**—If the thing that must be restored deteriorates without the debtor’s fault, the creditor must receive it, as it is, without any right to be indemnified; the provisions of art. 239 shall be applicable if it deteriorates due to the debtor’s fault].



Mention was made in the introduction to this chapter that some writers, such as Pontes de Miranda and Agostinho Alvim, in the early days implicitly touched upon the issue, when they held that ‘what is given in the case of unjustified enrichment is not the value of the thing at the time that the enrichment occurred, but the value of the defendant’s enrichment as it enriches him at the time the action is brought’,<sup>708</sup> and that ‘because what is at stake in an enrichment claim is restitution for enrichment, and not indemnification for damages, the enrichment must exist at the time of the action’.<sup>709</sup> These observations clearly suggest not only that the measure of restitution is the remaining enrichment and not the received enrichment, save exceptions, but also that where such enrichment no longer exists and the defendant in good faith and in reliance on the receipt has parted with the benefit, the non-existence of the thing qualifies as a defence.

Certainly the erstwhile treatment of the field as exclusively based upon undue payment compared to those of other jurisdictions that spoke of unjustified enrichment might have led to additional difficulties in recognizing the defence. As the Beviláqua Code exclusively placed emphasis on undue payment, the outcome was that the legal system looked also solely at the ‘pending assets’, failing to see what could have happened to the assets of the receiver. If due regard is also paid to the assets of the receiver, ‘the thinking that all cases of restitution (repetition) are linked to a payment is avoided.’ For example, asserts Pontes de Miranda, ‘restitution (*repetição*) of what was given as a donation, or the restitution due to the extinction of a credit *sine causa* is not a restitution of a payment; the reason for such restitution is that “there would be no *causa solvendi*”’. From there the author concluded that the cases provided for in the then arts 964-971 of the 1916 Code represented but only one form of the *condictio*.<sup>710</sup> The principles envisaged applied *mutatis mutandi* to other species as well, according to this author. Today we can safely say that ‘these other species’ represent all cases of enrichment *sine causa*, as recognised by the new Code.

<sup>708</sup> Pontes de Miranda, *Tratado das Obrigações*, Vol. 26 (1959) 167.

<sup>709</sup> A. Alvim, ‘do Emriquecimento Sem causa’ (1954) No. 173 *Revista Forense* 47-67 at 57.

<sup>710</sup> Pontes de Miranda, *Tratado das Obrigações*, Vol. 26 (1959) 167.

Thus, if on the construction of a coherent doctrine of unjustified enrichment, due regard is also had to what is happening in the assets of the receiver, and if such a receiver was in good faith or other legally recognised reasons are present that might justify a different outcome, it is just one step from recognizing that one cannot ignore the possibility of an ‘unjust depletion’ of the defendant’s assets in the calculation of the measure of enrichment. This is the same as to say that change-of-position (or loss of enrichment) is a possible defence to a claim in unjustified enrichment in the Brazilian law now that both sides of an enrichment claim are sanctioned – the *condictio* approach represented by the chapter on ‘undue payment (arts. 887-883) and the *actio de in rem verso*, represented by the provisions on ‘enrichment *sine causa*’ (arts. 884-886).

Despite that clear and penetrating reflection on the issue in its legal literature, the Brazilian legislature did not directly consider it nor mentioned it in the new Code. As said elsewhere, the reason for the omission is nowhere to be found in the legislative history; one is left therefore forced to speculate. The Brazilian legal literature (doctrine) clearly recognises that, in order to succeed in an enrichment claim, the enrichment must exist at the time of the petition. Hence, Alvim and others write that ‘the enrichment must be actual, that is to say, existent at the time the claim is made’.<sup>711</sup> A recent doctoral thesis by Maria Kroetz on unjustified enrichment at some stage tried to draw a distinction between enrichment *sine causa* and *responsabilidade civil* (law of delict or torts), especially in relation to the role of fault in the field. She remarked that ‘in the institute of unjustified enrichment the role of fault is very limited, and when it does play any function it only serves to guarantee that he who has been enriched in good faith is not obliged to restore more than the subsisting patrimonial enrichment’.<sup>712</sup> Though the writer cites no clear authority, nor makes reference to any of the provisions, whether in the chapter on undue payment or that of ‘enrichment *sine causa*’ or the ‘*negotiorum gestio*’ section, there is no doubt that, regardless of the categorization of the claim, all three sections require that the

<sup>711</sup> ‘O enriquecimento deve ser actual, isto é, existente ao tempo da demanda’.

<sup>712</sup> ‘No enriquecimento sem causa a conduta do enriquecido não tem tanta relevância, já que a obrigação de restituir o enriquecimento pode derivar até de um ato jurídico que não seja consequência da conduta humana. Neste instituto o papel da culpabilidade é bem mais restrito, servindo apenas para garantir que o enriquecido de boa-fe não tenha de restituir mais do que o enriquecimento patrimonial subsistente’ (M.C. Kroetz, *Do Enriquecimento Sem Causa* (2005) 77).

enrichment indeed be in existence at the time the claim is instituted. It is true that where the enrichment was in the nature of a thing transferred and such thing can no longer be restored because it has been consumed or is 'apparently lost', the enrichment must be restored by its monetary equivalent (art. 884 CC 2002). This formulation should not detract as it does not alter the requirement that the enrichment must be in existence. The very thing transferred may no longer be in existence, but it may survive in a different form, and in such a case its monetary value is the measure of the enrichment. But where it 'does not survive' in any different form, entitling the claimant any legal right to it, the loss of enrichment (change-of-position) defence is the right answer.

#### 4.3.2.1. *Can Article 238 of the New CC Be Fully Equated with § 818(3) of the BGB?*

Reference was made above that at least one Brazilian author (Michelon) thinks that an explicit statement of loss of enrichment (as stated under BGB § 818(3)) was not needed under Brazilian law because art. 238-242 deal with the problems envisaged by § 818(3) of the BGB. Article 238, in particular, according to the writer, is the provision that solves those problems. That is so because on the reading of the wording of art. 238 the need for the enrichment to be in existence is part of the factual support (*suporte fático*) of the obligation to restore an enrichment *sine causa* itself, says Michelin. The question that arises is this: Does the said article really encompass and capture the core of loss of enrichment defence as claimed?

In my view it does not. That is so because it can hardly be said that those provisions account for most situations where enrichment is acquired at the expense of another in the absence of any justification. If they do sometimes account for such a liability, which is probably true on the wording of art. 238, it seems that they would nevertheless only cover enrichment liability in which the gain alleged (the '*certain thing*' as the provision puts it)

is a non-fungible. And if such were the case, the very provisions of art. 884 of the new CC would be contradicted (as we will see below). Furthermore, the explanation of the writer is apparently based on a particular understanding of 'loss of enrichment'. He seems to equate the German provision to those of art. 238-240 of the Brazilian new CC and to assume that the German provision applies only in cases arising from an 'impossibility' to fulfil the obligation regardless of what that obligation is and how the obligation arose. That interpretation neither fits the German understanding of the provision in § 818(3) BGB<sup>713</sup> nor of any other legal systems that recognises loss of enrichment as a defence to an enrichment claim. By apparently equating all possible cases giving rise to loss of enrichment defence with supervening impossibility, regardless of the nature of the obligation, the author does not address the problem whether such provisions (art. 238-240) deal with generic obligations or specific obligations. It appears to me that where an object is destroyed or is irretrievably lost, a distinction should first be made as to whether the obligation in issue involved a *genus* or a *species*. It is generally understood that a 'generic obligation' cannot become impossible of fulfillment, since the genus is regarded as indestructible, while on the contrary, an alternative obligation, that is to say, an

<sup>713</sup> The German provision BGB § 818(III) reads as follows: 'The obligation to return [that which was received] or replace its value falls away insofar as the recipient is no longer enriched' {Die Verpflichtung zur Herausgabe oder zum Ersatze des Wertes ist ausgeschlossen, soweit der Empfänger nicht mehr bereichert ist}. It is preceded by § 818(II) which reads: 'If the return of that which was received is no longer possible due to its condition, or if the recipient is on other ground not able to return it, he has to replace its value' {Ist die Herausgabe wegen der Beschaffenheit des Erlangten nicht möglich oder ist der Empfänger aus einem anderen Grunde zur Herausgabe ausserstande, so hat er den Wert zu ersetzen}. In contrast the Brazilian provisions being equated to this provisions read, once again, as follows:

**Art. 238**—If the obligation to restore a certain thing, and this thing, without the debtor's fault, is lost before the transfer (*traditio*), the creditor shall 'suffer' the loss, and the obligation will be terminated, save his rights up to the date of the loss.

**Art. 239**—If the thing is lost due to the fault of the debtor, the debtor shall answer for its equivalent, plus the losses and damages.

**Art. 240**—If the thing that must be restored deteriorates without the debtor's fault, the creditor must receive it, as it is, without any right to be indemnified; the provisions of art. 239 shall be applicable if it deteriorates due to the debtor's fault.

**Art. 241**—In the case of art. 238, should there be any improvement or addition to the thing, without any labour or expense of the debtor, the creditor shall take the benefit, without any obligation to indemnify.

**Art. 242**—If in order to effect the improvement or the addition, the debtor has done some work, the case shall be regulated by the norms of this Code that deal with improvements done by a good faith or bad faith possessor. **Parágrafo único:** As regard the fruits received, the provision of this Code on good faith and bad faith possessors shall apply. (Portuguese wording is above and also at the end of this thesis in Appendixes I, II and III).

obligation involving a 'species', will be extinguished if all the alternatives become impossible.<sup>714</sup>

Hence, if one were to accept Michelin's contention that all cases dealt with under § 818(3) BGB are covered by the CC provisions of arts. 238-240 dealing with 'impossibility' to restore the thing in Brazilian law, one would also be bound to ask whether Brazilian law regards any obligations giving rise to the unjustified enrichment doctrine as limited to dealing with '*species*' alone, so that all such obligations are ipso facto extinguished if all alternatives become impossible. If the answer were in the affirmative, the institute of enrichment *sine causa* would be unduly restrictive. Certainly, art. 238 does encompass some aspects of loss of enrichment defence in so far as it relates to a non-fungible object, but it does not seem to me to be fully comprehensive to deal both with fungibles and non-fungibles.

An additional difficulty in accepting Michelin's interpretation is that he does not agree in his book that undue payment is a sub-species of enrichment *sine causa* as other Brazilian writers do. But when it comes to assessing the application of art. 238, he seems to contradict himself as that provision is in the general part, while enrichment *sine causa* is in the special part. If art. 238 were to apply to art. 884, as his interpretation seems to suggest, then the caveat of art. 884 would either be contradicted or made redundant, for such art. 884 already provides for a situation where the thing no longer subsists, and objectively excludes any defence such as that which the writer is invoking, because if the thing is lost, it shall be replaced by its value.<sup>715</sup> To be consistent with his interpretation Michelin would have to say that art. 238 applies only where the obligation to restore a lost thing is extinguished if the thing came into the hands of the debtor as a result of an undue payment, because only the provisions on undue payment (art. 876-883) are

<sup>714</sup> See for example the discussion on impossibility by D. P. Visser, *Unjustified Enrichment* (2008) 480. It does not however appear to me that Brazilian writers have explored the impossibility doctrine under such angle. I have discussed further nuances of the doctrine of impossibility of performance in failed bilateral agreements in chapter 3 above, and a brief mention of the Brazilian impossibility doctrine appears further below in this chapter at 4.5.3.

<sup>715</sup> Art. 884—*Parágrafo único*: 'If the object of the enrichment claim consists in a specific thing, he who has received it is under a duty to restore it, and, if the thing does no longer subsist, its restitution shall be effected by its value at the time it was demanded'. Art. 885 is even clearer in this regard.

apparently silent when the thing is lost. Aggravating the above difficulties in accepting the writer's contention is the fact that he does not tell us anything at all as to what the situation is under Brazilian law if the obligation under which the object was to be given up was a contract: Is that contract discharged wholly or partially by the supervening impossibility? Furthermore, he does not indicate whether the obligation is extinguished prospectively (*ex nunc*) or retrospectively (*ex tunc*). The non-existence of the object can come about due to differing factors, such as theft, or the object might have been destroyed by a natural disaster or any circumstance beyond the 'holder's' control, or it might have been alienated irretrievably with his knowledge but before he was put in notice of his lack of 'capacity' to do so, and even though the object still exists in a restorable manner, its restoration might be legally undesirable.

Finally, Michelin's interpretation would also need to justify why a defence to an 'unilateral act' is to be sought in the 'bilateral acts', as the drafters clearly situated an enrichment *sine causa* within the unilateral acts, though that is controversial anyway as we have seen earlier. This dichotomy 'unilateral' acts and 'bilateral acts' would imply that the provisions the writer mentions may not be applicable if the thing alleged to be destroyed ended up in the hands of the recipient under a bilateral act.

#### 4.3.2.2. *Further Traits of Loss of Enrichment Defence under the Provisions of the Code and the Doctrine.*

While dealing with the notion of 'without just cause' above under art. 884, I referred to the Italian notion of '*arricchimento senza giusta causa*' provided for under the Italian CC art. 2041. The reading of arts. 2037 and 2038(1) of that Code revealed that Italian law, in trying to be faithful to the Roman tradition in structuring its law of enrichment, recognised a contained notion of the change-of-position defence in the case of a gratuitous transfer (a gift, which is a valid contract) in good faith where the asset or benefit received has been lost, because under such circumstances it would be inequitable to ask an innocent and good faith receiver to restore such benefit at his expense. Were

this to happen, the innocent receiver would be treated as if he were the claimant's insurer. Under the Italian art. 2037, the claimant who is hit by the defence of change of position has to shift the resolution of the issue to the general principle provide for under arts 2041 and 2042 of the *Codice Civile*.

In arts. 877 and 879 of the new Brazilian CC 2002 we are presented with an analogous scenario, under the *condictio*-version of the enrichment claim (undue payment). We deal with an undue payment scenario that has as its object an immovable. These articles focus on good faith and what may actually happen in different kinds of scenarios. Let us consider a range of possible scenarios through a hypothetical example and explore the different possibilities in the application of the law.

'B', a 70 year old settler in Brazil, inherited a house from 'A', his great uncle, as a bequest under a will. All along 'B' and everyone around him believed in good faith that the house was his and lived there openly. Because of his old age and beset with infirmity, a year later "B" sold the house to 'C' to raise money to cover his medical bills and moved to a smaller apartment. 'C' paid a total sum of \$R\*500 000 for the house and registered it in his own name. Before the purchase 'C' had lived in a smaller house and poorer neighbourhood, but had worked hard and saved over the years to provide comfortable conditions to himself at an older age. He used up his savings of \$R250 000 to pay for the new house. The balance of \$R250 000 was covered as follows: \$R125 000 by selling several antiques and memorabilia items, and \$R125 000 from a bank loan for which he paid an interest of 20 per cent p/a and pledged his small house as security. To avoid long term indebtedness he took up a vacation job in England as consultant and worked 12 hours a day to boost his earnings and pay off the bank loan quickly. 18 months after having bought his house and having returned to Brazil, it is discovered that 'A', the bequest grantor, had skillfully forged both the will and the immovable property documents pertaining to the house. The house in fact belonged to 'Z' who had gone for military service to a distant country and was not heard of for 15 years. The house is currently fully registered in the name of 'C' and no one had discovered before the forgery

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\* \$R = Brazilian Real.

at the registration office, nor was the will ever put into question. Obviously ‘A’ is dead, and ‘B’ is now terminally ill and almost impecunious. ‘Z’ has since returned from his military service and wants his house back to him. It is plain that the original bequest from ‘A’ to ‘B’ was null and void, as it was based on a void document. Is ‘C’ protected under current Brazilian enrichment law? And, if so, what can ‘Z’ do? What will legally happen to ‘B’?

From this example, B’s enrichment resulted from a donation (a gift as explained elsewhere in this chapter is recognised as a valid ‘contract’). It is however an ‘undue payment’ (understood in its wider sense, i.e.; as lacking legal ground) because the ground of the donation (a proper ownership) did not exist. ‘B’ however acquired the immovable openly and in good faith and duly transferred it to ‘C’ for value. ‘C’ holds that immovable as a *bona fide* purchaser for value.

Scenario 1 – An ‘undue payment’ to “B”, resulting from a donation of “A” of an immovable belonging to “Z” which is subsequently conveyed to “C” for value, by the recipient (*accipiens*) (“B”), in which scenario, all parties (“B”, “C” and “Z”) act in good faith.

Scenario 2 – Gratuitous transfer to “C”, but in good faith, by the recipient (*accipiens*) (“B”) of an immovable unduly received from “A”.

Scenario 3 – Transfer for value by the recipient (*accipiens*) “B” to a third party “C” in bad faith of an immovable unduly acquired from “A”.

Scenario 4 – Bad faith of the recipient (“B”) who had notice of the facts resulting in the immovable being donated to him by “A”, in which case the immovable belonged to “Z” and is subsequently conveyed to “C” for value.

Before starting the analysis of each factual scenario presented above, some general remarks need to be made.



First, I start from the premise that in law if the enriched party holds the enriching object for value, and another person acquires such an enrichment (object) in good faith, the new acquirer, having had nothing to do with the lack of causa by the first acquirer, he is not normally liable. However a third party who acted in bad faith, is liable for the enrichment.<sup>716</sup>

Secondly, as the new Code structured enrichment law following a dual-pillar approach – *condictio*-claim (undue payment) and a *versio*-claim (enrichment sine causa) – I work from the questionable proposition (though I do not endorse it) that as regard to the *condictio indebiti* there is basically no difference whether the object that has been conveyed is a movable or an immovable one, and whether it is fungible or non-fungible.<sup>717</sup> Therefore, the provisions of arts. 876 and 877 apply to all of them alike. In this analysis, the premise is that a *solvens* that has transferred an immovable to an *accipiens* on an undue payment can have it restored to him if he proves that he paid by mistake. The parties are returned to the position they had been in prior to the undue payment.

Thirdly, no major questions are raised in regard to the settled law on the good faith possessor. It is prima facie accepted that if the *accipiens* acted without bad faith and received the payment believing it as due, he is treated as a good faith possessor. From this proposition, normally arise four important consequences: (i) the *accipiens* has the right to the fruits derived thereof;<sup>718</sup> (ii) he is not liable for the loss or deterioration of the thing, to which he did not give a cause (value);<sup>719</sup> (iii) he is entitled to be compensated for necessary and useful improvements, and can remove any luxurious improvements;<sup>720</sup> (iv) he has the right of retention for the value of any necessary and useful improvements.<sup>721</sup>

<sup>716</sup> Pontes De Miranda, *Tratado de Direito Privado, Parte especial*, Vol. 26. (1959) 190, [§ 3.147].

<sup>717</sup> S. Rodrigues, *Dos Contratos e Das Declarações Unilaterais da Vontade* (2003) 416.

<sup>718</sup> Article 878 of the new CC.

<sup>719</sup> Article 1.217 of the new CC.

<sup>720</sup> Article 1.219 of the new CC.

<sup>721</sup> *Idem*.

If, however, the *accipiens* acted in bad faith, he is then liable to respond as a possessor in bad faith.<sup>722</sup>

Fourthly, the working of the unjustified enrichment principle in the Brazilian Civil Code such as in the civil codes of many countries, entails a skillful exercise of cross-referencing with principles found in other areas of law, such as property law, contract and civil responsibility (known as ‘tort law’ or ‘law of delict’ in English-speaking jurisdictions), and sometimes various aspects of public law, such as fiscal legislation, etc. We have seen earlier that in the title dealing with enrichment law proper in the new Civil Code of 2002 there are no defences to be found, except, perhaps two or three, but that such defences are to be sought in the General Part of the Code. The reflection below is typically a cross-referencing to the principles mostly found under property law, but a strict and blind application of those principles may result in an undue enrichment or unjustified impoverishment of one of the parties to the transaction or to a third party.

Let us now consider the various hypotheses above as it may happen that having received an immovable as ‘payment’, the *accipiens* has transferred it, for value or gratuitously to a third person in good faith or in bad faith. What is the law’s solution? This problem, as we just mentioned above, can be split in various hypotheses, starting with the transfer where all parties have acted in good faith.

Scenario 1 – An ‘undue payment’<sup>723</sup> to “B” as a result of a donation from “A” of an immovable belonging to “Z” which is subsequently conveyed to “C” for value by the recipient (*accipiens*) (“B”), in which scenario, all parties (“B”, “C” and “Z”) act in good faith.

In these circumstances the legal system is confronted from the outset with two colliding interests, both protected by respectable principles of law.

<sup>722</sup> Article 878 read with art. 1.218 of the new CC.

<sup>723</sup> ‘undue payment’ here is used in wider sense, as it is indeed understood in the new civil code, i.e. ‘a performance which lack a legal ground’. In casu, the donation is invalid because the transferor (the *dnor*) did not have proper title (ownership) to bequest the asset.

On the one hand the interest of the *solvens* who, having mistakenly<sup>724</sup> transferred the ownership of a certain thing, seeks now to reintegrate it within his assets from which it should never have been separated. In this scenario, if the transfer is considered ineffective, due to the fact of resulting from an undue payment, the *accipiens* should not be able to effectively pass ownership of the immovable, because he was never the owner of it and he should never have been deemed to be as such. That being the case, the transfer he made to a bona-fide third party should have no legal effect because the transferor was not a *dominus*. If one applies the rule that only owners or their representatives are able to transfer ownership, the law should allow the *solvens* who has 'badly' paid, to reivindicar the immovable from whomever it has been transferred under such a payment.

On the other hand, there is the interest of the *bona-fide* third party who, having acquired the immovable from someone who was apparently its owner, has acted as any reasonable person would have acted in such circumstances.

Put differently, there is a competition between the interest of the *solvens* who has made an undue payment due to his own error, and the interest of a third party, who having acted in good faith and in the reliance of the unbeknown 'mistaken transfer', was induced to enter into a transaction for which he is now under the risk of suffering a loss. In the circumstances, which of the two interests shall merit the protection of the law? It would appear that under current Brazilian law in such a case the interest of the *bona-fide* third party is also the one to be preferred. That is so because having he done nothing to blame him, neither having he indirectly collaborated to bring about such a situation, if the law indeed held otherwise, he would find himself in the imminence of suffering an entirely unjustifiable a loss. Certainly, neither art. 876 nor art. 877 as currently formulated would sanction such a loss. So, if the articles of the Code just mentioned prefer not to sanction the third party's loss in such case, what else is that rather than saying that 'non-

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<sup>724</sup> In the example given above "B" transferred to "C" on a mistaken belief that he was the owner, or better ignoring that he was not the true owner. Therefore "B" was not a *domino*; he was just an apparent *domino*.

enrichment’<sup>725</sup> is a defence? Or if the notion of ‘no-enrichment’ is not really sustainable in these circumstances, one can also say that the law does not sanction restorability in this case for policy considerations; i.e.; the need to protect innocent and bona-fide receivers coupled with the ideal of security of receipt.

Furthermore having regard to the structure of the Code as a whole and the ideal that inspired its revision and the vision embodied in it that the interest of society be protected,<sup>726</sup> the legislator by helping the third party, is deemed not only to have legislated to protect the interest of such a third party, but also the interest of the society at large, because the solution of the law must be directed to reinforce confidence in the security of legal transactions, which any member of the society expects that they be firm and stable.

One would still argue in this example that the perceived deficiencies are in the efficacy of the public registries which are expected to detect any anomalies. If they cannot detect the anomaly in such transactions, why should the ‘the buyer’ suffer the loss, as he is also expected to act with due diligence? However, to this argument one can simply counter that, if there were any elements of doubt in the efficacy of public registries, as the example demonstrates applying a contrary position, to the extent of imperilling a buyer who has taken all precautionary measures to suffer losses, such an element of doubt in the law would represent an unsettling aspect of the whole legal order. Should that be the case, the legislator would be called upon to immediately redress it.

In the event that an undue payment happened on the transfer of an immovable, which was subsequently transferred by the recipient to a bona-fide third party for value, the law does

<sup>725</sup> ‘No-enrichment’ in this aspect is considered in a very abstract and technical form, for the assets still exist. It is ‘no-enrichment’ in the sense that the recipient acquired such asset for value and in good faith, and as such it is more related to the element ‘causa’ (an acquisition as if *cum-causa*), and for that reason it should stand. Here there is also a nuanced interface with the notion of acquisition without ‘fault’; but it is well known that fault is not a requirement under enrichment law and normally should not enter such realm.

<sup>726</sup> See similar remarks on contractual obligations by R. P. Nalin (*Do Contrato: Conceito Pós-Moderno* (2001) 79-80 which under the new Civil Code are expected to fulfill a social function and the role of good faith in contractual settings. At the time the author wrote he made reference to the contract in the then ‘Projecto de Código Civil’ (General Dispositions: Project CC art. 420, 421, 423) and to the Consumer Code (Código Do Consumidor) hereinafter ‘CDC’, art. 51.

not defer the solvens the right to reinvidicate the thing (art. 879) CC 2002). On the contrary, the law will allow the *solvens* to sustain the loss. But his prerogative of a regressive action against the *recipient* will remain. This solution, as Sílvia Rodrigues puts it, is an indirect conclusion from the provisions of art. 879 (the principle), and of an interpretation, (*a contrario sensu*), of the sole paragraph of this provision.<sup>727</sup>

The text of the article, *inter alia*, indicates that if the recipient has in good faith transferred an immovable received under undue payment, he is only liable for the value received. The sole paragraph by deferring to the *solvens* a revindictory action against a bad faith receiver, or a receiver who has gratuitously obtained the immovable, exonerates from it, *a contrario sensu*, whoever has in good faith acquired an immovable for value. This is akin to the American and English doctrine of good faith purchase for value without notice, which constitutes a defence under those laws, whether it is for a movable or an immovable, as discussed in chapter two of this thesis. That doctrine says that an ‘innocent purchaser’ is one who had no reasonable basis to suspect the seller did not have good title. The most significant impact of the *bfp* [*bona fide* purchaser] doctrine, as a defence to an enrichment claim, (as said in chapter two (of this thesis) above) arises when one is seeking to assert a right of ‘equitable’ origins against a third party who has acquired legal title. To establish the defence of ‘bona-fide purchaser’ it must be shown that the defendant has given value, in good faith, for the subject matter which the plaintiff claims; and, ordinarily, that he was without knowledge, actual or constructive, of such a claim at the time he acquired title.<sup>728</sup>

For our purpose the analogy and the relationship with change-of-position is that once a bona-fide purchaser for value is accorded the right to hold title, he is secure in what he has, and the plaintiff cannot lay claim on him. Put differently, what is at issue here is competing ‘equities’ if not interests. Both the claimant and the defendant have ‘title’ so to say, to the subject matter; but in such cases the best title is on the defendant, and

<sup>727</sup> S. Rodrigues, *Dos Contratos e das Declarações Unilaterais da Vontade* (2003) 416.

<sup>728</sup> See Chapter three above and authorities cited there, among which, *Lake City Corp v Michigan Avenue National Bank of Chicago* 337 NE 2d 251 (1975); 76 *American Jurisprudence* 2d, Trusts, § 269 et seq; G. Douthwaite, *Attorneys’ Guide to Restitution* (1977) 389.

therefore he must prevail in any claim for restitution. The apparent windfall he acquires is fully justified because he 'paid' for it.

*Scenario 2 - Gratuitous and good faith transfer of Title by the 'accipiens' of an immovable unduly received.*

In this case, the conflict between the interest of the third party who has acquired such a property and that of the *solvens* are put in different terms. That is so because on the one side is the *solvens* who is seeking to avoid suffering a loss (*certat de damno vitando*), and on the other side, the third party is seeking to make a profit, i.e, he wants to increase his assets (*certat de lucro captando*). In this respect, under Brazilian law Silvio Rodrigues is of the view that frequently when the Brazilian legislator is put under the dilemma to decide between the interest of 'qui certat de lucro captando' and that of 'qui certat de damno vitando', the legislator has shown preference for the latter.<sup>729</sup> But not everyone would certainly agree with this proposition. In any event I also agree with that position, as the most rational one and leave the matter there.

*Scenario 3 - Transfer for value by the accipiens to a third person in bad faith, of an immovable unduly received.*

In this situation, a similar solution to the one allowing a *reivindicatio* of an immovable property is in sight when a third party acted in bad faith. If the third party acquired the immovable knowing that it was the subject of an 'undue payment', there is no reason why the law should protect his interest, because of acting in bad faith. In this case the protection given by the good faith principle does no longer apply, hence giving way to the principle that protects the right to property. Therefore, the solutions in the case of an acquisition of property without value, or the acquisition of property by a third party in bad faith, are the same, and are provided for in art. 879 (parágrafo único) which reads: 'if the immovable was transferred without value, or, if, transferred for value, the third party

<sup>729</sup> S. Rodrigues (*supra*) (2003 ) 417.

who acquired it acted in bad faith, whoever has paid by error has the right to a reivindicatory action’.

*Scenario 4 -- Bad faith of the recipient, in the same hypothesis as above.*

If the recipient acted in bad faith, there is a possibility of a double solution, in conformity as to whether there is or there isn’t a third party acting in good faith. In the last hypothesis the solution was already given above. Given that the bad faith of the acquirer in such a circumstance does not deserve protection, the *solvens* can institute a reivindicatory action for the return of the immovable.

However, if the *accipiens* was in bad faith and the third party acquiring such a property was in good faith, the need to protect the position of the latter (the good faith acquirer) requires the ‘transaction’ to stand. However, in this case, the law, having precluded the undue payer in these circumstance to institute a reivindicatory action, it nonetheless grants him the right to claim from the mala-fide receiver not only the price received for the sale of the immovable but also the right to recoup his losses and claim damages.<sup>730</sup> This is what is provided for under art. 879 of the CC 2002 (caput).

In this last scenario, we see the possibility of two different outcomes, depending on whether there is or there isn’t a third party. However, whether there is one or not, the matter ordinarily remains solved within the property law principles and, only in secondary level other principles of law could kick in.

#### 4.3.2.3. *Concluding Remarks.*

As stated at the start of this analysis, there is a limited recognition of the change-of-position doctrine in this scenario, especially where the transaction resembles a gift (under the first scenario). The need of a legal system to protect the interest of innocent bona-fide

<sup>730</sup> Ibid. 418-419.

receivers and the security of transactions may entail for a transaction which could prima-facie be reversible to stand, and for that reason it is susceptible of leaving 'a windfall onto the defendant. Also in scenario no. 4, the law protects the third party who acquires the property in good faith but where the transferor was in bad faith. Though the law grants the undue payer the right to claim from the *mala fide* receiver not only the price received for the sale of the immovable, but also the right to recoup his losses and claim damages, there remain the possibility that such receiver might have absconded or gone bankrupt, or the proceeds of the sale were deposited in a bank that went insolvent. In these hypotheses what will the claimant recover? How will the law deal with the situation? If the banking institution went insolvent and there is no way the defendant can pay, can he not plead change-of-position (loss of enrichment) as a defence?

#### 4.4. Other Situations that May Generate Windfalls.

##### 4.4.1. *Non- Recoverability of debts arising from wagering games and betting.*

Articles 814-817 of the new CC 2002<sup>731</sup> deal with debts arising from wagering games and betting (jogo e aposta). Article 814 provides that 'a gambling debt or betting, are not enforceable; but a sum voluntarily paid under such activity is not recoverable, save if it was gained fraudulently (*por dolo*), or the loser is a minor or an interdicted person'. However, art. 817 specifies that a 'draw conducted to solve a question or to divide common assets is considered as a sharing mechanism or a transaction process, as the case may be'. Apart from this exception, the whole issue of debts arising from wagering and betting activities has strong relationship with enrichment liability themes as such debts

<sup>731</sup> Civil Code of 1916: art. 1.477 Civil Code 1916.



bring to fore questions of validity or invalidity of the cause underlying the transfer and the concomitant consequences. Sometimes it is thought that due to the peculiarity of such transactions, the creditor's right is mutilated because the underlying cause is tainted with illegality; or that the inquiry can be put at different levels depending on the facts in issue.

Thus, from this holding the following questions have often been asked under Brazilian law, depending on the angle from which the question of validity or invalidity is addressed: (a) does any credit result from such transactions, given that the right of the creditor is mutilated; or (b) do such transactions not give rise to any obligations, given that they are invalid?; or (c) alternatively, because such acts are not legally valid and therefore unenforceable, can they, as consequence, be considered or equated to 'no-acts' (i.e.; legally non-existent) and that for that reason, no obligation arises from them?

These are questions that almost date back to Roman times and the answers given to them in the various systems inspired by Roman law or others have varied over time. Though gambling contracts are often considered irrational and harmful for exploiting the mental frailty and other weaknesses of the people they target by causing economic advantages to be promised to them in exchange for the gambler's performance, the advantages to the gambling organisers generally exceed the value of the performance to such an extent that there is always a striking disproportion between them. When such contracts are permissible or 'tolerated', restitution of what was voluntarily performed is normally or often prohibited because it would be in itself indecorous and inappropriate to do otherwise. But there is no single solution to all situations. In modern times, several jurisdictions have devised a set of rules which are generally more flexible than in times gone by. In line with this modern trend, Brazilian law has developed its own solution, too. Though such solution has some remnants of the Roman times,<sup>732</sup> it has nonetheless

<sup>732</sup> Pontes de Miranda summarised the Roman position as follows; 'In Roman law there was no concept of nullity corresponding to the modern concept: *nec ullus, nullus*, era o que nada era; 'a void obligation was considered as non-existent, i.e.; a no-obligation. The Roman natural obligation existed in the so-called a natural sphere or natural plan, as if an under-world in legal sense; in a sphere that has not attained the 'world of laws'. The contract of gambling known as 'aposta' (the species of the gambling contract known in Portuguese as 'aposta') was considered as 'licit' (permissible); but that species known in Portuguese as 'jogo' was illicit, save if it was entered into with the aim of exercises or entertainment, or if its aim was that of fulfilling an object of immediate consumption. Under these circumstances, for Romans, the solution was

been updated to accommodate modern thinking. The law, as it currently stands, distinguishes between prohibited games; tolerated games and authorised games. The solution adopted for each type of game is a bit different, though in some respects they overlap. In the cases of a debt arising from a game in general, the sum voluntarily paid is not recoverable.<sup>733</sup> A prohibited game does not produce any obligations. In a tolerated game, the debt does not oblige one to pay it, but the debtor cannot recover a sum voluntarily paid. In an authorised game, the debt can be demanded by the winning player.<sup>734</sup> The non-recoverability is premised on two foundations: nullity and illegality.

Two exceptions are provided for which thwart the non-recoverability rule: (i) the case of fraud (or *dolo*) and (ii) the cases of a minor or of an interdicted person. The word *dolo* corresponds to fraud in a wider sense, including mischievous behaviour, trickery and dishonesty or scam as to the winner. In other words, the winnings are achieved by trickery or scam, for example by modifying for one's benefit or favour, the course of luck, or inducing the other party into an error, such as hiding the capabilities and abilities of one of the players, in which the loser has put his bet. If the loser is a minor or an interdicted person, the sum voluntarily paid is susceptible to be reclaimed. The reason for such recoverability is the presumption that the winning party took advantage of the insecurity of the minor, or of the inexperience and mental frailty of the interdicted person.<sup>735</sup> In such matter, it is understood that the benefit acquired by the winner was won dishonestly, and as a consequence there is no moral justification – and legal justification – to pay it. Put differently, there is no recognised legal cause for the minor or the interdicted person to pay. In the analysis we have been doing thus far, it simply means the benefit was acquired unjustifiably because the object of the 'contract' was illegal and

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that provided for under alternative (c) in the three hypotheses above. In modern law there are two conceptions a) and b), in addition to c). It is to be noted however, that under hypothesis a) above, there have been and there are still bifurcated disagreements among scholars on what is excluded and when it is to be excluded. The situation can graphically be represented as  $\{a^1 \text{ or } a^2\}$  in which case sub-category  $a^1$  is the situation in which the hypothesis a) would encompass or attract the denial of the claim only (a *pretenção*); and in sub-category  $a^2$  the [denial of enforceability] would encompass the action (a *acção*), a fact that would explain the non- repetition (non restoration)... (Pontes de Miranda, *Tratado do Direito Privado* Vol. 6 (1955) 47-49).

<sup>733</sup> *Revista dos Tribunais*, no. 467/ p.217.

<sup>734</sup> *Revista de Jurisprudência do Tribunal de Justiça de São Paulo*, No. 6 p.107.

<sup>735</sup> Arnaldo Rizzardo, *Contratos* (2002) 797.

as such it falls under art. 883 of the new Código Civil by analogy. Therefore that provision applies by cross-reference.

#### 4.4.2. *Illegality.*

The illegality defence is another candidate that may generate windfall, but such a defence will be the subject of a separate treatment at later stage as already mentioned elsewhere in this study. Therefore no further discussion of the issue is to be undertaken here, except to reiterate that there is however some connection with the supposed illegality discussed under the previous section. The whole issue of illegality, seen generally, has strong relationship with enrichment liability because it brings to fore questions of validity or invalidity of the cause underlying the transfer and the concomitant consequences. Sometimes it is thought that whenever one has entered into an illegal transaction, his right is mutilated because the underlying cause is tainted with such illegality. But in other occasions the inquiry can be put at different levels depending on the facts in issue. Where, however, illegality is raised and falls within the provision of art. 883 of the new Código Civil, the legislature has provided a clear indication how the judge should proceed: ‘whoever has given something with the finality of obtaining an unlawful, an immoral aim, or an end forbidden by law, he is not entitled to restitution’. And the caveat to this provision adds: ‘in the case of this article, whatever was given shall revert in favour of a local charity [designated] at the judge’s criteria’.

#### 4.4.3. *Prescription.*

Prescription was briefly discussed above and need not be repeated again. What is also said in chapter two of this thesis on prescription in other jurisdictions is mostly valid here as well. Any windfall a defendant may acquire through the operation of prescription is legally justified, though it might seem unjust. It might be important to remember, however, here that if someone has paid a debt that has prescribed, but such debt was nonetheless due, the payment is not recoverable according to art. 880 of the new CC 2002

(old Code 970) mentioned above. For some writers such rule seems to stem from a more technical conception of the foundations of prescription. It has been held that the real foundations of prescription is *to protect one who is not a debtor* and who may no longer have proof of the existence of the debt; but it is not to protect one who was a debtor and believed in the inexistence of the debt. This contention may no longer be correct today, but it was defended at various stages of the development of the Brazilian law, including by Pontes de Miranda,<sup>736</sup> and many others, but it seems to me the position he (Pontes de Miranda) rejected is the correct one, at least in part. That view says that a claimant's action will be held to have prescribed if, due to his own negligence, he failed to demand his thing or a debt for a long period of time.<sup>737</sup>

#### 4.4.4. *Enrichment and Public Law.*

This aspect is dealt with in the next chapter on passing on defence. It is well established under current Brazilian law that if one is dealing with performance in the public law, (e.g. payment of taxes, that a court decision has found unconstitutional), an enrichment action against the Ministry of Finance (Fazenda Pública) will be entertained, and if there exist a clause dealing with special prescription, such action (unjustified enrichment) shall be subject to that prescription rule.<sup>738</sup>

### 4.5. Ineffectiveness of Contracts in Brazilian Law

#### 4.5.1. *Introductory Remarks.*

<sup>736</sup> Pontes de Miranda *Tratado de Direito Privado*, Vol. 6 (1955) 100-101.

<sup>737</sup> The foundation of this last view under Brazilian law comes inter alia from the Imperial Decrees known as *Ordenações*. Thus *Ordenações Filipinas, Livro 4, Título 79*; *Ordenações Manuelinas Livro IV Título 80* are some of the direct references for such position.

<sup>738</sup> Related issues have been mentioned above when dealing with *res judicata* and the authorities cited there apply *mutatis mutandi* here. See Generally G. Tepedino *Temas de Direito Civil* (1999) 449-457 and corresponding text in the 2004 edition. See also historically how the issue was addressed in Pontes de Miranda *Tratado de Direito Privado* Vol. 26 (1959) 122. For current position see chapter 5 below when dealing with unjustified enrichment under the *Código Nacional Tributário*.

On the issue of ineffectiveness of contracts Brazilian law resembles closely with other civil law systems, but from time to time it encounters difficulties in defining the effects of termination of a contractual relationship for breach in which some theorists think the termination should have effect *ex tunc* and not *ex nunc*. The somewhat continuous scuffle in defining the precise meanings and scopes of concepts such as ‘resilição, rescisão, anulação, resolução’,<sup>739</sup> testifies to the difficulties, though their magnitude is somewhat limited.

#### 4.5.2. *Ineffectiveness of Contracts due to Breach.*

It is recognised under current Brazilian law that breach of contract may also generate the possibility of a windfall to one of the litigants. The remedies and effects of breach are generally discussions for contract law. However, the question whether on breach the relationship is terminated *ex tunc* or *ex nunc* has occupied the attention of some Brazilian writers like in other jurisdictions. If the effects of the breach are considered *ex tunc* and not *ex nunc*, the result could indeed be to create an interface between enrichment law and contract law. But these problems, though they might have received some insightful debate under current Brazilian law, time and resource constraints hinder any detailed consideration of the issue in this jurisdiction for the time being. It is, however, evident that one of the major controversies which have surrounded rescission *ex tunc* under Brazilian law is indeed to define whether in addition to restitution for breach to which the aggrieved party is entitled, he is also entitled to recover any form of damages (*indenização*). The difficulty is thought to be a logical one which arises out of the retrospective effect of rescission *ex tunc*. If rescission requires the parties to be restored to the position they would have been in had the contract not been entered into, how can damages (*indenização*) for breach be awarded? The two remedies are said to be inconsistent in that damages (*indenização*) is a compensatory remedy which aims at placing the aggrieved party in the economic position he would have stood in had the

<sup>739</sup> ‘Resilição, rescisão, anulação e resolução’ would roughly translate respectively as ‘cancellation, rescission, annulment and discharge’.

contract been properly performed. The operation of the subsidiary rule also limits the dynamic of this kind of cases under Brazilian law, though from time to time they do surface. This is one of the areas where some Brazilian private law scholars at the 'Primeira Jornada de Direito Civil'<sup>740</sup> gathered in Brasília put into question the unqualified subsidiarity rule under the new Code.

All indications are, however, that it can be said that Brazilian law does not consider the possibility of its 'faint' change-of-position doctrine enshrined under the impossibility of performance approach (art. 238 new CC) in cases of breach of contract. The remedy is wholly contractual and no issues of enrichment liability are generally considered. The situation however might be different if the obligation ceases due to impossibility of performance.

#### 4.5.3. *Brazilian Impossibility of Performance Doctrine.*

Article 238 of the new CC<sup>741</sup> offers a clear glimpse on the Brazilian impossibility of performance doctrine, though it mostly relates to the destruction of the object that must be restored. Brazil, like most civilian law countries, sustains generally the rule that impossibility of performance leads to 'nullity' of the obligation.<sup>742</sup> The underlying idea in such a proposition is that the court cannot compel a person to do what is impossible. The refusal to compel specific performance, however, does not preclude the award of damages. If the impossibility extends to the entire obligation, Brazilian law considers the entire obligation as void. Because the general rule under Brazilian law is that enforcement of the obligation is assumed to be the primary remedy, (see the emphasis on the concept of good faith), it becomes as a matter of logical conclusion that it would also be inappropriate to demand specific performance, when the performance in question is, or

<sup>740</sup> Enunciado No. 36 – I Jornada de Direito Civil – Conselho de Justiça Federal (11 a 13 de Sept. 2002).

<sup>741</sup> Brazilian Civil Code of 2002 art. 238.

<sup>742</sup> This position is based on the idea expressed in the Justinian Digest that *impossibillium nulla obligatio* (D. 50.17.185). Thus art. 166(ii) of the new CC clearly states that 'it is considered null and void an obligation whose object is illicit, *impossible* or indeterminate' (emphasis added). Article 104 of the new CC expresses the same idea in the positive when it declares that 'the validity of an obligation requires that its object (ii) be licit, possible, determinate or determinable'.

has become, impossible. This is the effect of the following provisions of the new *Código Civil*: art. 607 of the new *Código Civil* dealing with contracts for the provision of services;<sup>743</sup> art. 399 dealing with a debtor in *mora*;<sup>744</sup> and art. 106 dealing with a ‘temporary’ impossibility,<sup>745</sup> which, a *contrario sensu*, indicates that a permanent impossibility discharges the obligation; and arts. 123-124 sanctioning the invalidity of an obligation where it was subject to a condition which is impossible, illicit or unintelligible. However, if one of the parties had promised to do the impossible, he may nevertheless be liable in damages, e.g. because he was at fault in assuming the obligation when he knew or should have known of the impossibility. But, sometimes such liability is restricted to compensation of the other party’s reliance loss, – perhaps because the terms of the contract are considered to include a guarantee that performance was (or would be) possible; or because one of the parties was responsible for the impossibility. The disposal of the subject matter of the contract, though it *prima facie* seems as a case of breach, is ordinarily considered as a case of impossibility.

Judging again from the position argued by Cláudio Michelin described earlier in this chapter that the cases dealt with under the German BGB § 818(3) are resolved under Brazilian law by applying the provisos of art. 238 of the new *Código Civil* which provides that ‘if the obligation to restore a certain thing, and this thing, without the debtor’s fault, is lost before the transfer (*traditio*), the creditor shall ‘suffer’ the loss, and the obligation will be terminated, save his rights up to the date of the loss’. It would seem that, if this provision applies alike to synallagmatic failed contracts, then the main contention defended under the proposition is that the creditor always bears the risk. Put differently, the ‘*res perit domino*’ seems the predominant approach under Brazilian law. However, as I said earlier, it is not clear whether the provision of art. 238 indeed applies in synallagmatic situations as well as in unilateral acts, because the provisions of art. 884 under the Brazilian new CC clearly reiterate that if the thing is lost, it must be replaced by

<sup>743</sup> In terms of this article a contract for the provision of services is discharged, inter alia, with the death of any of the parties (...) as well as for impossibility of performance by either party due to *force-majeure*.

<sup>744</sup> This article provides that a debtor in *mora* is answerable for the impossibility to perform, even if such impossibility arose from a fortuitous event or a force-majeure, if such events occurred during the delay, save where he can prove that he was not at fault, or that the ‘loss’ (or damage) would have happened anyway had the obligation been performed in time.

<sup>745</sup> The provision states that an ‘initial impossibility of the object does not invalidate the obligation if the impossibility is relative, or if it ceases before the realization of the condition to which it was attached’.

its value, and that provision appears in the title on unilateral acts. It does not seem to sanction loss of enrichment as a general defence under current Brazilian law, and the inference that art. 238 applies to such cases should be seen with reservation without further authority.

Notwithstanding the above said, it appears however clear that the performance of an obligation to pay money is virtually never considered to be impossible, so that the action for an agreed sum (which is conceptually a kind of specific enforcement) cannot be resisted on the ground of impossibility.

#### 4.6. General Conclusion.

My investigation found no conclusive reason why the Brazilian legislator opted for a general enrichment claim and at the same time omitted to make reference to the general defence. Obviously, the function of a general defence as provided elsewhere in this study is to curb the very wide general enrichment principle, and the legislator has clearly mentioned the subsidiarity rule which to some extent serves such function. However the legislative history and the *travaux préparatoires* do not reveal that due consideration was given to the effectiveness, desirability or undesirability of the general defence compared to the subsidiarity rule and that the subsidiarity rule was chosen to the detriment of the general defence.<sup>746</sup> Indeed, recent doctoral studies in the country by Maria Kröetz<sup>747</sup> and Giovanni Ettore Nanni<sup>748</sup> on unjustified enrichment in general under the new Code as well as other theorists who have recently discussed the topic did not find that there has been a substantial and sustained discussion on the desirability of the subsidiarity approach. An earlier consideration of the issue in the 1950s by Agostinho Alvim<sup>749</sup> did however note that the subsidiarity requirement did not always have a universal adherence in the Brazilian academic literature (known in the country as ‘doctrine’). There were

<sup>746</sup> I have mentioned elsewhere that few months after the enactment of the new CC the ‘unqualified’ subsidiarity rule came under attack by Brazilian experts meeting in Brasília and they recommended limitations to it straight away.

<sup>747</sup> M.C. Kroetz, *Do Enriquecimento Sem Causa* (Curitiba, 2005).

<sup>748</sup> G. E. Nanni, *Enriquecimento Sem Causa* (São Paulo, 2004).

<sup>749</sup> A. Alvim (1954) No. 173 *Revista Forense* 47-67 (Sep/Oct).



some theorists, according to the author, who were of the view that the action of enrichment *sine causa* was not necessarily subsidiary, because it could concurrently function with other actions of the 'ordinary law' or in its place when the said action becomes impossible due to an obstacle not contrary to law.<sup>750</sup> Some attributed to it a minor importance while others thought the law of enrichment could do as just well without it.<sup>751</sup>

Under these circumstances, it appears safe to say that the lack of a clear mention of the loss of enrichment (change-of-position) defence in the new Brazilian *Código Civil* may be a legislative oversight. That is so because there is no clear indication to be found anywhere in legislative history why the legislature chose to omit it. Several Brazilian academics writing on the new code in comparison with the old one also found that arts. 884-886 did not pass through a sustained 'scrutiny' between the Draft Project of the 1970s and the time the Code was finally adopted in 2002. For example, Carlos Camillo<sup>752</sup> and others commenting on the New Civil Code and comparing the new provisions with those in the old Code simply state that 'these provisions were adopted as they came in the Ante-Project'.<sup>753</sup> They acknowledge that they have no antecedent in the previous Code, but no discussion of them in the Senate is referred to.

Hence, I am of the view that the lack of a general defence might be a lacuna in the legislation, in the same way that the previous Code of 1916 embodied a lacuna in omitting the general enrichment principle against unjustified enrichment and led the jurisprudence to resort to analogy and general principles of the Code to solve any emerging problems under the *de in rem verso* features. Michelon's explanation can positively be viewed as another indirect attempt resorting to such analogy to solve problems he might have already identified. The only difference is that he is now applying the analogy on the defence side while before the recognition of the general principle of

<sup>750</sup> Ibid, at 65.

<sup>751</sup> E. Espínola '*Garantia e Extinção das Obrigações*' pp 101ss.

<sup>752</sup> C.E. Nicolletti-Camilo et al, *Comentários ao Código Civil de Acordo com a Lei 121.280/2006* (São Paulo 2006).

<sup>753</sup> For a general criticism of the whole Civil Code see among others G. Tepedino '*O Velho Projeto de um Revelho Código Civil*' (1997) No. 1 *Revista Jurídica Del Rey* 17 (Dezembro 1997); Also Reprinted in the 1999 and 2004 editions of his *Temas de Direito Civil* 437 and 460 respectively.

enrichment *sine causa* the analogy had to be applied on the liability side. We have seen that that technique had its limitations and the doctrine demanded a catch-all provision to solve the issues that could not be solved under that technique. In sum, given that an *actio de in rem verso* now sanctioned under art. 884 is of ‘an equitable’ nature,<sup>754</sup> and demands that no one should unjustly and unjustifiably benefit at the expense of another, it should also provide that no one should unjustly and unjustifiably be prejudiced in restoring an enrichment. Loss of enrichment should have been directly sanctioned as a defence under the New Code. The subsidiarity rule is somewhat too restrictive to encompass an adequate protection to the parties’ interests.

### **PART III. REFLECTIONS ON BRAZILIAN ENRICHMENT LAW FROM ABROAD.**

#### **4.7.1. *Introductory Remarks.***

This section considers briefly and critically some significant issues raised by the formulation of the general principle against unjustified enrichment in the new Brazilian *Código Civil*. Special focus is placed on the words ‘after updating monetary value’ and the consequences emanating from that ‘expression’, namely: the conundrum of ‘interest in money’ and to what extent a claim is amenable to be adjusted.

#### **4.7.2. *What does the Brazilian Approach and Experience Tell Us?***

The general manifestation of the unjustified enrichment doctrine under current Brazilian law is to some extent similar or analogous to many other civil-law jurisdictions, especially those following the ‘Pothier School’, varying only in some nuances. But there are at least two important aspects in which Brazilian law is very peculiar and such aspects relay noteworthy messages to other jurisdictions. The first message that can be extracted from the Brazilian formulation of the unjustified enrichment doctrine is that in whatever

<sup>754</sup> I have made reference earlier that some writers such as C. Michelin do not subscribe to this labelling of art. 884, but the practical application of the institute so attests.

way a legal system tries to ward off loss of enrichment as an objective defence in its enrichment law, the system will still need to address the issue. If it cannot do so directly, it will do so indirectly (mostly by analogy). If a system gives way to a general enrichment action, it is bound to establish not only mechanisms to protect vulnerable receivers, but also to specify to what extent its enrichment law will delimit the right of recovery in 'borderline' cases. Omitting a general enrichment defence and relying on an indirect reasoning is however problematic. That is because the approach may lead to the conception of an enrichment doctrine which is too restrictive and that leaves aside many deserving cases in the attempt to protect the integrity of the principle as enshrined in the code.

The need of a change-of-position defence becomes even stronger if that system also places emphasis on the concept of good faith throughout its private law. That is exactly what happens under current Brazilian enrichment law because the notion of good faith<sup>755</sup> permeates the civil code at large. Being that the case, and because of the implicit desire of the legal system to keep in line with the rest of the Romanistic tradition, it becomes inevitable that subtle manifestations of the loss-of-enrichment defence in the Brazilian enrichment law would appear now and then. That is, for example, noticeable in art. 878 where the system seeks to protect a good-faith receiver of an undue payment when he is in a position analogous to that of a possessor in good faith as regards fruits are concerned.<sup>756</sup> The proviso in art. 238 discussed above is to the same effect, albeit only partially so. Many other provisions scattered in the Code would require such protection if the need and the circumstances arise.

<sup>755</sup> On the notion of good faith in contractual obligations and related issues see also R. P. Nalin (*Do Contrato: Conceito Pós-Moderno* (2001) 79-81 referring to arts. 420, 421, 423 considers, among other things, that the new Civil Code is expected to fulfill a social function. The role of good faith, especially in contractual settings, becomes then prominent. (Please note that at the time P.R. Nalin wrote, he made reference to the contract in the then 'Projecto de Código Civil' (General Dispositions: Project CC art. 420, 421, 423) and to the Consumer Code (Código Do Consumidor) art. 51. For this reason the reference numbers differ from the final version of the Civil Code).

<sup>756</sup> Article 1.214 reads: A good faith possessor is entitled to the fruits while the posse in good faith lasts. And art. 1.217 provides that 'a good faith possessor is not liable for the loss or deterioration of a thing for which he 'gave' no causa' – emphasis added - [Probably the drafters meant 'he acquired without a cause']. In Portuguese: O possuidor de boa-fé não responde pela perda ou deterioração da coisa, a que não der causa.

The second important message emanating from Brazilian enrichment law is the need to establish the real place and the consequences of inflation within enrichment liability. Generally speaking, under private law most legal systems adhere to the ‘nominal value principle’, and this principle *prima facie* constitutes an ‘obstacle’ to adapt say, a contract, on the basis of regular inflation unless the parties have agreed to do so. While on the one hand, the creditor normally ought to bear the risk of depreciation, an appreciation of the value of the currency would seem to be empathetic to the debtor.<sup>757</sup> The situation, however, might be different where such inflation is no longer ordinary in so far as contract law in general is concerned. Here we encounter two trends of thought, (in some legal systems), one adhering strictly to the ‘nominal value principle’ while the other advocating adjustment rules. Each of them advances different reasons to sustain their contention. Those adhering to the general application of the nominal principle usually contend that it would be contrary to the ‘criterion’ of reasonableness and equity, if, for example, the judge were to adapt a contract in random occurrences, where many other people in the society at large will equally be affected by the same ‘exceptional inflation’. However, where regular inflation affects a long term contract, there is a tendency to consider exceptional cases and allow some judicial intervention to adjust the contract. The underlying idea for such adjustment is that it would be unreasonable if a disproportionately inflationary advantage simply fell into the laps of one of the contracting parties. To avoid that ‘unjust’ outcome, some theorists think that the ‘disturbed contractual equilibrium should always be restored’.<sup>758</sup> These considerations, however, fall mostly within contract law, though their ambit can have ramifications

<sup>757</sup> See for example art. 6:111 of the Principles of European Contract Law. To the same effect is art. 6:258 of *Burgerlijk Wetboek*, BW- (new Dutch Civil Code) and to some extent also art. 6: 260, BW. In the Dutch legal doctrine, for instance, A. S. Hartkamp (*Asser's Handleiding tot de beoefening van het nederlands Burgerlijk Recht, Verbinstenissenrecht, Algemene leer der overeenkomsten* (2005) n. 338 (as cited by Mirella Pelletier “Common Core of European Private Law – Change of Circumstances – Dutch Report” (Research Offices, Supreme Court of The Netherlands) at <http://www.unexpected-circumstances.org/Dutch%20report%20nov.%2006.doc> (last accessed 19 April 2009)) remarks that in reverse cases in respect of the influence of appreciation of immovable property on marriage settlements, the Dutch Supreme Court (*The Hoge Raad*) disregarded the nominal value principle on the basis of unforeseen circumstances. In other words, it adjusted the value taking into account appreciation or depreciation of the currency. Hartkamp refers here to cases reported at HR 10 January 1992, NJ 1992, 651; HR 15 September 1995, NJ 1996, 616; HR 12 June 1987, NJ 1988, 150. (HR=Hoge Raad)

<sup>758</sup> Few example of case law going in this direction in Dutch law can be found in HR 12 June 1987, NJ 1988, 150; HR 30 January 1991, NJ 1992, 191; HR 15 September 1995, NJ 1996, 616. (all Dutch cases cited here are taken from Mirella Peletier (supra) footnotes 21-23).

beyond that field. What exactly is the position under unjustified enrichment law in which the parties to the claim may not necessarily be linked by an underlying contract denoting voluntary assumption of risks? Can monetary inflation qualify as a form of change of position/circumstances? If so, how would it operate? What difficulties are there proving or disqualifying this potential head of the defence?

These questions arise incidentally in this thesis because the new Brazilian Código Civil appended 'monetary adjustment' to the general principle against unjustified enrichment,<sup>759</sup> which indicates that the issue transcends the ambit of contractual obligations. Earlier in this chapter I took the view that such appendage to the general principle was unfortunate, as it throws the general principle into confusion. But my disapproval of the appendage does not mean the issue should not feature within the enrichment doctrine. I then highlighted that the drafters of the Civil Code should have done so in a separate provision. What does really inflation tell us in such contexts?

The general process of inflation can give rise to a multitude of different problems, and for our purposes the most salient of which would be two distinct issues, namely, that of revalorization and that of discharge. Once again we see here that there is a need in enrichment context to know how the enrichment came about. While revalorization (of a currency) in our context presupposes a debt that must be paid or re-paid in certain monetary units and thereby the possibility of adjustment; discharge of the obligation, on the other hand, tells us that the claim arises from a contract and there are underlying cost variations. When inflation is seen from the perspective of possibly discharging the contract, the concept presupposes a voluntary agreement between the parties, and inflation might be seen as one of the risks voluntarily assumed; when it is seen from the notion of revalorization, the concept does not necessarily presuppose a contract between the parties; it may also entail a unilateral act.

The issue straddles several areas: third party claims, risk assumption, termination or variation of contracts, etc. Apparently in the cases of devaluation there is ordinarily no

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<sup>759</sup> Brazilian new Civil Code art. 884.

problem of impossibility to restore the benefit received, nor is there any issue of bad faith. The receiver is ready to restore the benefit received, with the only problem that the 'purchasing power' of the money has diminished. Restoring the 'money' in the same units as received corresponds 'numerically' with restoring the 'value received', but value-wise, it actually corresponds to the 'value remaining'. On what basis can then the plaintiff claim the restoration of the 'actual value' (adjusted value), without leaving the defendant worse off, as a result of having received an undue/unjust gain? Why the loss should in these cases be shifted from an innocent and 'mistaken or unmistakable' party to an innocent party who neither made a mistake nor brought about the event that led to the decline of the value?

The message that can be distilled from the Brazilian enrichment law (the new enrichment *sine causa* under art 884 of the new CC as discussed above) is that a situation of hyperinflation can result in involuntary enrichment of one party at the expense of another. The issue, however, is complicated to be addressed within the enrichment doctrine, because the act enriching one party and correspondingly impoverishing the other is ordinarily not done by the parties themselves, but by a third party who mostly happens to be the public authority (the government), or outside events, such as market turmoil in times of global recessions or conflicts. From the perspective of the parties such an incident (currency devaluation) is more akin to a supervening event outside their control. Both parties would seemingly be in the position of two innocents. Can then the rule which says that 'as between two equally 'innocent' parties, the position of the defendant is the better', apply to such cases? What would be the implications of such application?

Thus far it is a moot point in South African law as well as in English<sup>760</sup> and American<sup>761</sup> laws whether monetary inflation can qualify as a relevant change of position for enrichment law. Such a situation would be more common where there is steep currency fluctuation or devaluation, or a total collapse of the currency such as it was in Brazil in the 1980s-1990s or the current upper-inflation of Zimbabwe. In the assessment whether inflation should be considered as a potential head of change of position, a distinction must then be made between different degrees of inflation: a slight inflation, a severe or acute inflation and a total collapse of the currency. Although the last two aspects might be considered speculative in some economies, we have a living example – Zimbabwe – where it cannot be said that that inflation is acute or severe, but simply as a total collapse of the currency. It is not unimaginable that the judiciary might be called upon to decide enrichment cases in these circumstances. Where the claim arises from a ‘functioning’ contract, the contract itself might provide for payment to be ‘index-linked’, but this only works if the inflation is somewhat predictable and manageable, and the remedy is to be founded in contract. Where the inflation is so extreme to amount to total collapse of the currency, an ‘index-linked’ approach by the parties themselves may not work, the contract is simply ‘defunct’ and performance should simply amount to near-impossibility, and therefore discharge might be the logical outcome. It is more likely that in cases of extreme inflation or total collapse of the currency, such effects on contracts and other private law matters would be dealt with by legislation and the questions raised here would not need to be resolved by the courts applying the common-law principles.<sup>762</sup> But should such legislation be wanting, there would still be room for judicial pronouncement and, in my view, the change-of-position defence would be available in the circumstances.

<sup>760</sup> Note however for English law that a dictum by Lord Roskill in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] 1 AC 675, 712 refers to ‘inflation’ as one of the ‘circumstances in which the doctrine of frustration has been invoked, sometimes with success, *sometimes without*’. So it is not very clear whether inflation falls within the former or within the latter groups of circumstances.

<sup>761</sup> Note equally some nuanced references to discharge of contract for inflation in Corbin, *Contracts*, § 1360 who says that the ‘difference in value between the gold and paper currencies could have been taken into account in action for damages’ and thereby suggesting the possibility of discharging the contract. (References to gold and paper currencies are in relation to the *Gold Standard*, for which see more details in the Brazilian discussion of ‘*atualização de valores*’ [updating monetary value] in chapter four above; or as commonly known as the *Bretton Woods* system). For related issues on the Gold Standard and possible unjust enrichment in currency devaluation in USA, see *Perry v US* 294 U.S. 300.

<sup>762</sup> G.H. Treitel, *Frustration and Force Majeure* (1994) 277 (§§ 6-041 to 6-042). See also once again the Brazilian discussion above and the adoption of the ‘indexed-system’ in the years 1980s-1990s.

The same rationale presented in the question as to whether change-of-position should be available to public authority in the ‘disaster version’, as discussed further down in chapter five, would *mutatis mutandi* apply in these cases.

#### 4.7.2. ‘Updating Monetary Value’ and Interest on Money.

Corollary to ‘adjustment of monetary values’ in the unjustified enrichment doctrine is another important incidental question: that of interest on money. This question, though incidental only, is of great significance because it may influence the whole conception of the enrichment law. Is interest on money recoverable under current Brazilian enrichment doctrine? If it is not, that is the end of the matter. On the contrary, if it is, then the following ramifications arise: If interest is due on a sum of money that must be restored, it is obvious that such interest is more likely regarded as a fruit<sup>763</sup> of the principal sum. That being the case, it must also be assumed that such interest is to be earned from the time of the receipt of the money,<sup>764</sup> or at least from the time of *litis contestatio*. Then, for example, if it is assumed that in an undue payment claim the restoration of interest is no less due than the restoration of the principal, the further question that need to be asked is whether there are two different regimes for the recoverability of interest in enrichment claims under Brazilian law. Or to frame the question in its underlying components one would ask the following subsequent questions: (i) Is interest recoverable on a claim based on undue payment – the *condictio* version – or not? If it is, from what sum and from what moment it starts to run? (ii) Is interest recoverable in a claim based on enrichment *sine causa* or not? And; (iii) if the answer to (ii) is in the affirmative, from what moment it starts to run and what consequences does the recoverability of interest have on the calculation of the measure of enrichment under art. 884?

<sup>763</sup> For example art. 878 of the Brazilian Civil Code may implicitly be said to consider interest as a fruit, for the article provides that ‘to the *fruits*, accessions, improvements and deteriorations accrued to the thing given in undue payment apply the provisions of this code dealing with a good faith or a bad faith possessor, as the case may be.’ (Emphasis added).

<sup>764</sup> Other provisions of the Code making reference to interest are art. 591 referred to in the note immediately below; arts. 297, 389, 395, 404, 405, 406, 407, 552, 677, 833, etc.



If one considers that in many cases falling within the undue payment (- the *condictio*-version of the enrichment claim) there is no special agreement between the parties regarding recovery, it should also be assumed that there might be no recovery of interest. That is so because the sum 'owing' on undue payment is not a commercial loan. Even if it were considered analogously as a loan ('a *mutuum*'), the proviso dealing with 'o mútuo', arts. 586-592, do not attract interest except where the *mutuum* falls within the provisions of art. 591<sup>765</sup> in terms of which a 'mútuo' given for economic finality attracts interest.<sup>766</sup>

In this view of the non-recoverability of interest on undue payment the assumption that I am making is that if the party received the money in good faith believing it as his own, then, he must also be free to deal with his money as he deems fit. Were it otherwise there would be a peril that the defendant who has not been earning interest on the money that he received will be subject to an obligation to restore beyond the extent of his enrichment. This would be equivalent to imposing liability on the back of the people. Put differently, if I had no agreement with you for the receipt of your money, I cannot be bound to pay you interest on that sum, because I am not your investor. Therefore, in cases of money paid by mistake and kept by the defendant there is no guarantee that the defendant has been earning interest. A probable exception to this assertion, if the receiver is in good faith, is where the money was directly deposited in an interest bearing account.

If we consider again an earlier assertion made above that in unjustified enrichment the thing unduly transferred is part of the transferee's assets and the transferee is then to be

<sup>765</sup> Article 591 reads: "If a loan (*mutuum*) is given for economic aims, interest is presumed, and such interest may not exceed the rate referred to in art. 406 (of the Code) on annual capitalization, otherwise it will be subject to reduction" [Destinando-se o mútuo a fins económicos, presumem-se devidos juros, os quais, sob pena de redução, não poderá exceder a taxa a que se refere o art. 406, permitida a capitalização anual]." [If a loan (*mutuum*) is given for economic aims, interest is presumed, and such interest may not exceed the rate referred to in art. 406 (of the Code), sanctioning an annual capitalization', otherwise it will be subject to reduction].

<sup>766</sup> The Brazilian Civil Code drafters manifest here an authentic fidelity to Roman law, because interest was not payable on *mutuum* in Roman law as it was considered a gratuitous loan normally between friends. In fact the drafters clearly distinguish two types of loans: the 'comodato' (arts. 579-585) and 'mútuo' (arts. 586-592). 'Comodato', according to the Code (art.579) is the loan of non-fungible objects, while 'mútuo' is conceived as the loan of fungible objects (art. 586). The borrower in the case of 'mútuo' is 'obliged to restore to the lender what he received from him in an object of the same nature, quality and quantity'.

considered as its ‘owner’ until such time as it is claimed by the plaintiff that such ‘thing’ cannot remain within the defendant’s assets because of the lack of *causa retinendi*; and considering further that under art. 237 of the Civil Code, in the cases of obligations to give a *certa res* [obrigação de dar coisa certa] ‘the *thing* with its improvements and additions belongs to the debtor until it is transferred’, and that while it is ‘the debtor’s property the fruits earned from it belong to the debtor, but those pending belong to the creditor’, then it might also be inferred from there that if interest is considered as a fruit and it is earned while the *thing* (the principal sum) is the property of the debtor (because it has not yet been transferred), then that fruit belongs to the debtor. By implication the principal amount cannot be considered as a loan. Therefore, interest can only be claimed on a different ground. Probably policy ground is the only candidate that might be persuasive.

Meanwhile if the word ‘fruits’ in art. 878 of the Code is understood to also encompass ‘interest’, as it indeed would appear to do (unless ‘thing given in undue payment’ excludes money, which does not make sense), then the defendant equated to *mala fide* possessor can (or will) be liable to the extent he was enriched by the ‘fruits’, even if they might have been consumed. Should, however, a defendant under a claim falling within such provision be equated to (or assumed to be) a *bona fide* possessor, he might not be liable even to the extent that he was enriched by the ‘fruits’ which he gathered and consumed in good faith. I reiterate once again that the provision clearly says that “to the *fruits*, (...) accrued to the thing given in undue payment apply the provisions of this Code dealing with a good faith or a bad faith possessor, as the case may be”.<sup>767</sup> Here we clearly see that the Brazilian legislature by framing art. 878 (in so far as the consequences of the accrued fruits to ‘a thing received in undue payment’ are concerned) to analogously differentiate a defendant who is a *bona fide* possessor from a *mala fide* possessor, it directly indicates that the maxim ‘*bona fide possessor facit fructose perceptos et*

<sup>767</sup> The main provisions of the Code on good faith possessors that are relevant to our purpose are given in translation in annexure B at the end of the thesis. Articles 1.201, 1.214 and 1.217 are the most directly related to the issue. Art. 1.214 says that ‘a good faith possessor is entitled to the fruits received while the possession in good faith lasts; and art. 1.217 says that ‘a good faith possessor is not liable for the loss or deterioration of a thing to which he ‘*gave no cause*’ (emphasis added).

*consumptos suos*<sup>768</sup> would indeed apply to such cases. This, in turn, implies by inference that a defendant who is equated to a *bona fide* possessor under art. 878 of the Brazilian Civil Code has the defence of change of position (or loss of enrichment) as far as fruits are concerned. That would also imply that the same defence applicable to the ‘fruits’ is open to the ‘principal thing’ received itself. But let us remain for the time being with the question of interest in the enrichment law as a whole.

What about a case falling within the *actio de in rem versio* aspect of the claim? Does it attract interest and, if so, why? The circumstances giving rise to such a claim may vary from case to case, and there appear to be no unanimity about the contours of the claim. Nonetheless, the provisions of the Brazilian Civil Code (arts. 884-886) are silent. For this reason any conclusion to the effect that an interest is claimable must be drawn either by inference or by cross-referencing to other provisions of the Code. Nonetheless, based on the general principle of law, ‘*prima facie*’ interest seems to be claimable in unjustified enrichment law besides the principal sum.<sup>769</sup> But this is a mere general inference alone. According to art. 404 of the Code, ‘losses and damages’ in obligations payable in money are to be paid adjusting their monetary values in accordance with official indexes regularly established. The payment encompasses ‘interest, expenses and lawyer’s emoluments, without prejudice for the ‘conventional sentence’ [*da pena convencional*]’. And according to article 405 of the Code ‘interest on *mora* runs from the ‘initial citation’ i.e. from the moment of the issue of judgment<sup>770</sup> (in some cases, I think, it is probably from the moment of first notification). These two provisions, however, cannot be said to apply to an enrichment *sine causa*, because art. 404 speak of ‘losses and damages’, which clearly indicates it is not applicable to enrichment claims because an unjustified

<sup>768</sup> Translated the maxim means ‘The *bona fide* possessor makes fruits gathered and consumed his own’.

<sup>769</sup> For comparative insight see the new Article VII. -5:104 of the European Union DCFR (Draft Common Frame of Reference) a project of Study Group of the European Civil Code Project presented to the European Commission on 18 December 2008. Art.VII. -5:105 there reads: ‘Reversal of the enrichment extends to the fruits and use of the enrichment if the enriched person is in bad faith at the time that the fruits or use are obtained’.

<sup>770</sup> I am of the view that ‘initial citation’ is used in a wider sense. In some contexts it would appear that ‘initial citation’ is strictly equated with ‘court judgment’ as ‘citation’ seems to refer to a judge pronouncement. However, if to be put in *mora* were to be understood in that sense alone it would either be too restrictive or even contradictory in some cases. A defendant who has been notified as owing a sum of money is certainly put in *mora* from that moment if he knows that money is not his to keep and the court decides so only at a future date.

enrichment claim is about ‘gains obtained at another expenses without valid ground’ and not about ‘losses or damages’ suffered. ‘Losses and damages’ presuppose contractual or delictual (tort, or civil responsibility) claims. Article 405 also cannot be said to apply because a defendant in an unjustified enrichment claim is not presumed to be *in mora* for the payment of money until such time he has notice to the contrary. Until then, the defendant must be able to rely on the money that he received as absolutely his. By inference, however, art. 405 cast some light on the issue. If interest on *mora* runs from the initial citation,<sup>771</sup> that implies that from the time the defendant has notice, interest starts to run, which by implication can be extended to an enrichment claim, because if under the enrichment *sine causa* doctrine the measure of enrichment is calculated from the time of ‘*litis contestatio*’ (or *litis pendente*), that also means that from that moment the defendant has notice of the claim and any money ‘being retained *sine causa*’ is now due as if it were a debt, unless the defendant has a recognised defence.<sup>772</sup> It can analogously be said that from the moment of ‘*litis contestatio*’ the defendant is put in *mora*, and therefore interest would equally start to run, and the sum ‘owed’ from that moment is the base value (the principal sum) for calculating interest.

Article 884 provides, however, that the amount to be restored is ‘known’ only ‘after adjusting monetary values’. Then, if the principal sum to be restored is not known until ‘monetary values have been adjusted’, can it really be said that the defendant has been put in *mora* for that ‘unknown value’ of the ‘debt’? Put differently, if monetary adjustment is to be undertaken, from what date interest starts to accrue and based on what principal sum? Is it the ‘pre-adjusted-value’ or the ‘adjusted value’ that is the principal amount for calculating interest on the sum due?

In any event, before I elaborate further on these questions, it is worth remarking the idea that a sum held *sine causa* is susceptible to be adjusted according to the level of inflation implicitly embodies a nuanced conception of that sum being analogously considered as a commercial loan (*a mutuum*). On this assumption, one might say that interest would

<sup>771</sup> I use ‘initial citation’ in its wider sense I just described above.

<sup>772</sup> Obviously if ‘initial notice’ is equated to court judgment, whatever defence the defendant might have had is of no consequence after judgment.

accrue as of right, unless the parties ‘agreed’ otherwise. If it does not accrue as of right, then it might be dependent on other factors.

If the measure of enrichment is considered as the ‘value received’ and such value is only ‘known’ with certainty after the value of the money has been adjusted according to the rate of inflation at a given period, there is no ‘exact amount’ on which to calculate interest until such adjusted sum is determined. In such cases there arises incongruence between the ‘sum claimed’ as the amount by which the defendant has been enriched as ‘principal value’, and the sum on which the interest is to be calculated. For example, if ‘B’ is enriched *sine causa* at the expense of “A” for the sum of \$R 50 000 on the 29<sup>th</sup> January 2008 and by 31<sup>st</sup> January 2009 there is a 50 per cent inflation of the currency with the result that the real value of the owed sum of \$R 50 000 has now shifted to \$R 75 000 by the time judgment is passed, a simple interest of 20 per cent on the principal amount owing as due from 29 January 2008 to 31 January 2009 would amount to \$R 10 000, but if the principal sum for the calculation of interest is now considered \$R 75 000, a 20 per cent interest on that sum is \$R15 000, if calculated per annum. Interest may also not be due before the date of the determination of the value (the day the judgment is issued), because there is no principal amount to serve as the basis for the calculation of the interest. If the rate of 20 per cent interest is charged on the \$R 75 000 now owing, it may not be applicable retrospectively to the date of *litis contestatio* (the date the claim arose), because no such amount was owing on the 29 January 2008. The defendant was never put in *mora* on that date as owing the sum of \$R 75 000. It is plain in law that interest is ordinarily due either *ex lege*, *ex contractu* or *ex mora*. If none of these aspects apply, in principle it becomes difficult to levy interest on a sum of money to be paid. One must then find ways to justify why interest should be due on that sum of money to be paid.

In essence, if we accept that the ‘final’ proof of the extent of enrichment is only established after ‘adjusting the monetary values’, we are effectively saying that any sum to be awarded for interest will be assessed as a ‘pre-judgment’ interest if it started to run from the time of receipt of the money. At the level of principle we encounter a dilemma: because, on one side, we are saying that ‘whenever a defendant receives money and

keeps it for a reasonable time, there is a presumption that he is earning 'fruits' with that money and therefore he is being enriched *sine causa* with our money; but, on the other side, it is also plain that we are not certain that the defendant is actually earning any interest and therefore being enriched. Consequently, in the face of uncertainty to allow relief in any case where actual enrichment is not yet proved is inconsistent with the fundamental principle of unjustified enrichment.

## CHAPTER V.

### PASSING ON A TAX BURDEN AS THE REVERSE FACE OF CHANGE OF POSITION

#### The Story of the Hazard Federal Republic.

*Three years ago the Government of the HAZARD Republic (population: 50 million) enacted ten Statutes and three Special Regulations. All Statutes passed in ZARAS Parliament and still stand. Article 7 of the first Special Regulation issued under Statute 3 establishes what is known as 'extra taxes' and the government has imposed for the past three years an extra tax of 25 cents of a Rand (Rand 0.25) for every 350 ml of a bottled or canned beer sold in the country whose market is 50 million people. Twenty Percent of the population drinks at least one 350 ml tin of beer every week. The beer industry is the monopoly of two big firms. They decided to pass the burden of the tax to consumers by increasing the price of a 350 ml tin by 25 cents of a Rand.*

*In this simple scenario, the result in numbers came to this: Each person consumed 1.4 liters of a beer per month or 18.20 liters per year. At the end of each year the firms had shifted the financial burden of R 13.00 (thirteen Rand) to the consumer. The 10 million consumers each year paid R 130 million in extra tax to the government through the two beer producers. In three years this amounted to R 390 million. After three years the extra tax on beer was declared unconstitutional. Incidentally it is also discovered that the same 25 Cents of a Rand was also imposed on all soft drinks produced by these firms and three other firms. The entire population drinks at least one 350 ml tin of soft drink produced by these companies each week and all five firms passed on that R 0.25 to the consumer as well. The amount collected from the soft drinks alone in three years was R 1, 950 Billion.<sup>773</sup> Now that it has been found that the extra taxes were unconstitutional, the two firms go to court asking the ZARAS Republic to pay back to them both the R390 Million and the R1.950 Billion in unjust or unjustified enrichment of ZARAS at their expense.*

#### 5.1. Introductory Remarks.

'Passing on' essentially entails that the plaintiff has shifted on to a third party the 'financial' burden that is consequent upon the defendant's unjust enrichment. In the most common scenario, a business apparently liable for tax makes payment to the government, but it also attempts to recoup its losses by raising the prices that it charges to its customers. When the tax is subsequently determined to be improper or inapplicable, the business seeks repayment as a relief. The government resists such a claim arguing that its enrichment came not at the plaintiff's expense, but rather at the expense of the plaintiff's

<sup>773</sup> This sum is roughly equivalent to £ 140 Million, US \$ or C\$ 280 Million and R\$ 600 Million (Brazilian Reais).

customers. Is it then vital to the unjustified enrichment doctrine sanctioning such a defence? If so when, why or why not? What does such recognition imply in regard to change-of-position defence?

Some theorists, attempting to systematise the defences that can be raised against an enrichment liability, view passing on, if recognised in the legal system, as a form of changed circumstances defence on the plaintiff's side<sup>774</sup> that thwart in full or in part its *prima facie* right to recover a benefit unjustifiably transferred onto the defendant's hands. An underlying idea to this conception of passing on is the reasoning that a plaintiff is only entitled to recover that which it can prove it has lost to the defendant who is now better off, while the claimant has been made worse off. If this *quadrature* cannot be established, then the law should favour the defendant.

It is noteworthy to remind ourselves that it is essential to the law of unjust or unjustified enrichment that if someone obtained something at another's expense, whether it is a payment or other kind of benefit, to which he was not entitled, he has been unjustifiably enriched. If that someone is a taxing authority, and the something alleged to have been gained by him is a payment of money and the money came to him in the form of a tax or a 'levy' that was not due, because of, say, the unlawfulness of the legislation or regulation under which it was exacted, or for any other reason, the principle still applies: no one shall enrich himself (or retain a benefit acquired) at another's expense without 'plausible justification'. Therefore, the benefit must be restored to whoever has the right to it. The giving-up of that benefit can however be challenged by a recognised defence. Passing on (or disimpoverishment<sup>775</sup> as some scholars suggest it should be called) is one of such possible defences. In some quarters the defence is also termed 'unjust enrichment of the payer or the claimant'.<sup>776</sup> This idea, in part, embodies the notion of 'dis-

<sup>774</sup> G. Virgo, *The Principles of the Law of Restitution* (2006) 715-716; D. P. Visser, *Unjustified Enrichment* (2008) 748.

<sup>775</sup> M. Rush, *The Defence of Passing on* (2006) 1; 9-12 and 17 prefers to call such defence 'disimpoverishment'. This notion captures the nuance of a claimant who has first been 'impoverished', but as a result of subsequent events he has since ceased to be impoverished.

<sup>776</sup> See the European Court of Justice case *Just I/S v Danish Ministry for Fiscal Affairs* (case 68/79 [1980] ECR 501, para 26) that refers to the defence in such language: [Community law] 'does not require an order for the recovery of charges improperly made to be granted in conditions which involve the unjust



impoverishment' but adds an extra dimension to it, in that the claimant becomes himself the victim of his own claim. If passing on is seen from a different angle and by analogy to the mitigation rule in the law of obligations, it can be said that the plaintiff by so shifting his financial burden onto the third party, has effectively 'minimised' his own losses. If that 'mitigation' was in 'full' to the extent of eliminating the entire loss (recouping the entire loss), then he has rendered his claim 'nugatory'. Should he insists on such a claim, he is likely to become the 'victim' of his own claim, for, as will be seen later, on one approach enrichment law is said not to be designed to confer windfalls onto plaintiffs who may have suffered no loss.<sup>777</sup>

Previous chapters highlighted that the conception of the enrichment doctrine prevalent in a legal system will also influence what defences that system has and how those defences are perceived. Once again, this notion is of some importance in the evaluation of the passing-on defence. There is sometimes 'tension' in the various legal systems under analysis as to when and how the enrichment claim is to be calculated. Some hold that an enrichment claim should be capped by the extent of the claimant's loss. The reason presented for such capping is that if it were otherwise, either the plaintiff would in turn enrich himself if he were to recover more than he lost, or an enrichment claim would mirror punishment if the defendant were to disgorge more than the claimant's loss.<sup>778</sup> Even when there is general agreement on the basic reason, the opinions may still diverge over whether the claimant's loss should be 'calculated' at the moment the defendant is 'unjustifiably' enriched (the claimant's initial loss), or later, when the claimant commences his enrichment action (the claimant's ultimate loss). While some writers believe that consideration should be given to the value of the claimant's initial loss,

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enrichment of those entitled'. See also the description given to the fourth specific defence by the English Law Commission (Law Com. No. 227 (1994) - *Restitution: Mistake of Law and Ultra Vires Public Authority Receipt and Payments* – paras. 10.5 -10.8) which is discussed further below for the purposes of the specific defences to the general right of recovery under English law.

<sup>777</sup> See *Kingstreet Investments* case below discussed under Canadian law and the Brazilian approach in Acórdão 14.810/02 (2ª Turma), Impugnação 40.01011540 – 43 (MG).

<sup>778</sup> M. Rush (*The Defence of Passing on* (2006) 109) thinks, however, that the reason for such capping is analogous to the notion of '*nemo dat quod non habet*'. I am not persuaded with this reasoning. Perhaps Rush understands the adage in the reverse: if you have not given it because you did not have it, then you cannot claim it as yours. But that is not the ordinary meaning ascribed to this adage.

others hold that it is the claimant's ultimate loss that provides the appropriate limit to the award in an enrichment claim.<sup>779</sup>

This difference of opinion has one major consequence for the understanding of the passing-on defence. If a system holds that only the claimant's initial loss should be used to assess the extent of an enrichment liability, it should also, as a matter of logical necessity, reject the defence of passing on. That is so, because whatever steps a claimant may take to avoid his loss, after the initial transfer, are irrelevant to his enrichment claim.<sup>780</sup> To reiterate, it is the measure of the transfer that is the measure of the claim. By contrast, if a system considers that the claimant's ultimate loss provides the upper limit to any claim, it could be expected to endorse the defence of passing on.

It will be seen later in the discussion that where the passing-on-defence is 'recognised', when it is advanced by a defendant, depending on the facts of the case and various other factors, the extent of the defendant's liability may also be reduced or extinguished altogether. Thus, because the defence of change of position, just like the defence of passing on, is concerned with the defendant bringing to account for dealings which, while are causally connected to his enrichment, reduce or extinguish his enrichment liability, it is also thought that for reasons of symmetry the defences should co-exist in the law of unjustified enrichment.<sup>781</sup> The desire of symmetry in the law is based on a belief that consistency is important and should be maintained in the unjustified enrichment doctrine. Not everyone, however, agrees with this desire for symmetry in regard to the defences, because of the fundamental principle underpinning enrichment law itself. Though under these circumstances like cases should be decided alike, this is only desirable if the fundamental principle underpinning enrichment law is convincingly defensible in both cases, says the contrary argument.<sup>782</sup> Consequently, given the possibility that when the defence of passing on is recognised in a legal system, it may also theoretically be of general application, it is undesirable that it should be available to public authorities. This

<sup>779</sup> R. Grantham & C. Rickett (2003) 62 *CLJ* 159, 166.

<sup>780</sup> M. Rush, *The Defence of Passing on* (2006) 109.

<sup>781</sup> *Ibid* 179-180.

<sup>782</sup> *Ibid* 180. M. McInnes (1997) 19 *Sydney LR* 179.

is because they will inevitably be backed by the inherent power of the State which will act upon the citizen with some sort of duress or ‘coercion’ in improperly demanded tax situations. For these reasons, the second view is to the effect that between allowing government retention of a benefit obtained through ‘extortion’ and allowing restitution to a claimant who merely suffered an immediate expense, policy considerations point to the latter.<sup>783</sup> This is so because it is overwhelmingly observed that the temptation for misconduct is constant in the case of a government defendant, and as a natural conclusion it has to follow that enrichment law must favour deterrence over philosophical consistency.

In the light of the above observations, this chapter discusses the passing-on defence by first presenting the theoretical foundations of such a notion, and seeks to scrutinise its sustainability in the private law of enrichment. Thereafter, it proceeds to present the contention that a distinction should be made between recovery under the ordinary ‘private-law of enrichment’ and a ‘public law of enrichment’ by public-authorities, especially if taxation is at issue. I attempt to present the pros and cons of such approaches. After presenting these theoretical analyses, I proceed to survey the defence as applied or discussed in the various jurisdictions under consideration and I critically address *in loco* some nuances whenever deemed necessary. The order followed is the same as in chapter three above. A discussion on the situation in Brazil is included in this chapter because it apparently has a passing on defence in its enrichment law. Finally, in the light of the general theme of the thesis, before drawing the conclusion to the chapter, I discuss the interface between the change-of-position and passing on defences.

## 5.2. Theoretical Analysis of the Passing-on Defence.

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<sup>783</sup> See for example M. McInnes (1997) 19 *Sydney LR* 179 at 197; *Kingstreet Investments Ltd v New Brunswick* (2007) 1 SCR 3 discussed below under Canadian Law.

We have just seen above that the passing-on defence arises where a plaintiff has shifted to others the burden that is consequent upon the defendant's unjustified enrichment. At one level passing on is 'related' to the illegality defence – and can present the features of the *in pari delicto* rule or simply as a one sided illegality allegation. At another level it raises problems of good faith in connection (if taken together) with the knowledge requirement. If the claimant knew (or suspected) that the tax or levy being demanded was unlawful or 'illegal', but did not protest its unlawfulness and consciously passed the tax or levy on to the customers in the knowledge that he will recoup more profits, his intention (action) of passing it on can be said to be tainted with 'sharing' in the unlawful act (*in pari delicto*), albeit indirectly. He cannot now be heard to say that he did not know of it and ask the court to assist. If the defendant is said to be a wrongdoer, then no enquiry should be made whether the defendant's gain is commensurate with any loss he suffered or might suffer, and he cannot successfully defend himself by saying that the plaintiff has passed on the taxes which he paid. The situation is different where the unlawfulness of the statute/regulation was on both ends revealed later, say by a court decision, and all along none of the parties knew or suspected its unlawfulness. Where there was no protest from the claimant one could also add that the lack of such protest brings the claim into the realm of voluntarily made payments. Here the absence of coercion from a public authority as a defendant would also entitle it the defence of change of position. If it can be shown that the public authority simply acted under the statutory provisions which imposed 'penal' sanctions but had not threatened the taxpayer, it is entirely understandable that the court would allow such a public authority to plead change of position. This is because a public authority which mistakenly thought that it had the power to levy the tax can be said to have acted in good faith. As it is with the claimant, here the same analogy applies to the defendant, that is to say, a public authority which made the demand knowing that it was illegal to do so must surely be deemed to have exerted illegitimate pressure<sup>784</sup> and cannot have the benefit of the defence. The problem however with the good faith aspect in the passing-on defence is how to categorise a public authority as a wrongdoer when it has acted under a 'genuinely' passed legislation, which only later transpires to be either *ultra vires* or invalid. Though it is

<sup>784</sup> G. Jones, *Restitution in Public and Private Law* (1991) 38-39.

theoretically possible to ascribe wrongdoing to a public entity, in practice, the circumstances leading to the imposing of ‘unlawful’, ‘inappropriate’ or ‘*ultra vires*’ taxes or levies onto the claimant can hardly fit the description of ‘intentional’ wrongdoing.

The defence of passing on, as far as it is related to unlawful tax collection, also raises the fundamental problem of standing to sue. Who is the real party to claim the lost benefit or assets? Some hold the opinion that in the operation of such a defence the real claimant was established by the legislature, for in the operation of the transactions, the business-plaintiff passed-on such loss to third parties – usually customers – thereby offsetting his losses. In this view of the defence, the state by collecting the tax from the hands of the claimant, is said to be collecting its dues from the consumers through this business-person.<sup>785</sup> In fact, the claimant here is to be seen as a mere ‘conduit-pipe’; an ‘agent’ or mere intermediary of the state or government in the collection process of what is due to the state from the customers or consumers. Because he is a mere intermediary, he should have no ‘standing’. He has no ‘standing’ because as a ‘plaintiff-conduit’ he acquired no interest in the tax money, and therefore, he has no right to get it back. Viewed in this manner the claim sustains the idea that to permit the intermediary to recover the money from the taxing-authority or the government, would award to the plaintiff its customers’ money. If such is what the result would entail, then the unjust enrichment of the plaintiff would result not from overcompensation (the windfall argument, or that the law of unjustified enrichment is not designed to confer windfall to the claimants), but from acquiring property from the government that belongs to someone else. This argument however seems flawed on several grounds and it is usually resisted in practice. First, to advance this contention in the context of unjustified enrichment, the very notion of the unjustified enrichment doctrine must be distorted to encompass only a physical transfer approach to the whole field.<sup>786</sup> Secondly, it must also be accepted that the title to the tax-money paid by the customers to the business-person when the consumers ‘purchased’ their products or rendered the ‘services’, remained in the customers. The intermediary never acquired ‘ownership’ of such money, but such an intermediary is only to be seen as

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<sup>785</sup> W. Woodward (1985) 39 *U Miami LR* 873.

<sup>786</sup> *Ibid* 873.

a 'constructive trustee' for the claimant's money that the tax-collector unlawfully demanded from the customers. The correctness of such an analysis seems equally unsustainable because when the business-plaintiff claims the illegal tax-money he is seeking it for himself and for this very reason he has a sufficient stake in the controversy to make the controversy justiciable.<sup>787</sup> He is therefore the real party in interest, because he is asserting his own claim and is seeking the money for himself.<sup>788</sup> As the question of standing involves an inquiry into whether the plaintiff has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy, the plaintiff in these circumstances usually has standing when he alleges that the defendant's action has caused the plaintiff economic or other injury. The taxpayer-intermediary, in these cases, probably has suffered some financial injury as a result of the illegal tax even where he has recouped the entire amount of the tax from the customers.<sup>789</sup>

There is no doubt that in such circumstances what was paid to the government as a tax came both from the business-person (or 'intermediary') and the customers. One of them is viewed as the *immediate* payer and the other – the customer – as the *ultimate* payer. Though it might be disputed, it sounds defensible that the requirement 'at the expense of' in the law of unjustified enrichment merely requires that the defendant's enrichment be at the plaintiff's *immediate* expense, but it does not necessarily require further that the defendant's enrichment to be at the plaintiff's *ultimate* expense.<sup>790</sup> In this perspective the relevant enquiry to sustain an enrichment claim is to ask where the burden consequent upon the defendant's enrichment (the government in *casu*) initially arose, and not where it eventually came to rest. In other words, the passing-on of the burden of the payments

<sup>787</sup> It was for example observed above, in the discussion of the Brazilian law in chapter 4, that normally a claim in property entails title has not passed, and for that reason the plaintiff will be revindicating what is his and never formed part of the defendant's assets; but an enrichment claim presupposes that title has passed and the claimant will be asking what 'is not his', but asserts that it cannot continue as part of defendant's asset due to lack of '*causa retinendi*'.

<sup>788</sup> W. Woodward, (1985) 39 *U Miami LR* 873, 890.

<sup>789</sup> *Ibid.*, at p. 897, footnotes 109-110. See also the economic analysis of the application of the defence in antitrust (competition) law given below.

<sup>790</sup> See for example the analysis of Brennan J in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* [1994] 182 CLR 51 arguing in this line of thinking.

does not affect the situation that as between the government (public authority) and the payer, the former was enriched at the expense of the latter.<sup>791</sup>

The proper conception of the passing-on defence in taxation matters also depends on the nature of the tax levied on the plaintiff as well as the legislative scheme that imposed that tax, because not all taxes necessarily have equal characteristics, nor obey equal legislative schemes.<sup>792</sup> In the ordinary course of events, various sales taxes, for example, may obey an entirely different plan in the legislative scheme where the legislature from the outset contemplates wholesalers and retailers. The legislative scheme may impose the tax prior to the goods entering the retail market, either upon the antecedent sale by wholesale or upon the immediately antecedent wholesale value which the goods possess.<sup>793</sup> In these cases, because the tax is often levied upon the value of goods, the sales tax<sup>794</sup> is generally regarded as a duty of excise. A central feature informing this character of sales taxes is that the economic burden of the impost is generally not intended to be borne by the person liable to remit it; it is to be passed on.<sup>795</sup> In contrast, income taxes, for example, which are charged in such situations as income conventionally defined as well as all capital gains, and even gifts, inheritances and lottery winnings, cannot be said to be

<sup>791</sup> (1994) 182 CLR 51 at 90-91; M. McInnes (1997) 19 *Sydney LR* 179, 181.

<sup>792</sup> It is incontestable that the primary object of taxation is, and has always been, to raise money for government expenditure. However, taxes may also be imposed not for revenue purposes but to discourage the activities taxed, such as the duties levied on tobacco and alcohol aimed at discouraging smoking and heavy drinking, though the law makes no express indication that these are to be abandoned as it does when it 'makes them criminal'. See C. Whitehouse, *Revenue Law – Principles and Practice* (2002) 6-7.

<sup>793</sup> *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29 (14 June 2006), Para. 8.

<sup>794</sup> See for example the description of sales tax versus the 'business and occupation' tax (B&O) by of Justice Richard B Sanders in *Herbert Nelson v Appleway Chevrolet Inc* (case No. 77985-6- April 2007 WA App (Supreme Court of the State of Washington), clearly indicating that sales tax was expected to be passed on, but not the 'business and occupation' (B&O) tax on the same product.

<sup>795</sup> See for example in this regard the recent case in the Australian High Court *Avon Products Pty Ltd v Commissioner of Taxation* [2006] HCA 29 (14 June 2006), especially paras. 7-10 referring to such schemes both in the Constitutional context and other legislative instruments. John Tiley et al in *Revenue Law* 5<sup>th</sup> Ed. (2005) 18 explaining the difference between Direct and Indirect Taxes have this to say: 'A direct tax is one which is demanded from the very persons who, it is intended or desired, should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of the other: such as the excise and customs. The producer or importer of a commodity is called upon to pay a tax on it, not with the intention to levy a peculiar contribution upon him, but to tax through him the consumers of the commodity, from whom it is supposed that he will recover the amount by means of an advance in price'. Further, the authors explain that '(...) there is thus a fundamental distinction between the economic 'recoupment' of a direct tax and the simple passing on (often in the form of straight percentage of the price) which is the hallmark of indirect tax, i.e.; between the recovery of a direct tax by a more-or-less circuitous operation of economic forces and the passing-on of a tax in a recognizable form'.

designed to be passed on. This view of sales tax is based on the consideration that the imposition of the tax in respect of some dealing with goods by way of sale or distribution in the expectation, or with the intention, that the taxpayer will not bear the incidence of the tax but will indemnify himself/herself by passing it on to a purchaser or consumer. This characteristic of the tax enables one to say of it that its fundamental concern is with goods rather than with the person from whom it is exacted.

One must equally consider the nature of the economy (or even a sector of the economy) in which the tax is imposed, whether it is an economy geared towards making profit or otherwise.<sup>796</sup> It is no novelty that, in the cases of sales tax in an economy geared towards profit-making, such tax will be expected to be passed on, as the profit-making motive of business will generally require that outcome. That is the case because, with the exception of few cases in which sales tax is separately identified and added on top of the invoice price after sale,<sup>797</sup> sales tax can only be passed on indirectly through the price mechanism. In a profit-making structure, businesses will set prices so as to ensure at least that all foreseeable costs are recovered, anything above being conceptualised as a margin of profit. Because sales tax in the wholesaler-retailer situation is levied upon the vendor prior to the ultimate sale by retail as explained above, it forms part of the cost structure of doing business. Therefore, there is nothing really extraordinary in the proposition that in the usual course of things sales tax, in these cases and in myriad others, will be passed on.

Because of the normality of the situation that the tax in such circumstances is expected to be passed-on, it is also incumbent upon the taxpayer who is asserting a claim in unjustified enrichment in these cases to establish that a circumstance out of the ordinary,

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<sup>796</sup> For example The European Court of Justice in *Les Fils de Jules BiancoSA v Directeur Général des Douanes* [1988] ECR 1099 at 1119-20 discussing the defence of passing on, and evaluating whether a charge had been incorporated into a business price noted, inter alia, that 'it may be relatively easy in a regulated economy (in which a government both imposes an invalid tax and sets the price at which a product or service is sold) to determine whether or not a charge has been included in a price'. Though cautiously the court refused to assume passing on even in such circumstances, it still highlighted that 'it is quite probable, depending upon the nature of the market, that the charge has been passed-on. However, the numerous factors which determine commercial strategy vary from case to another so that it is virtually impossible to determine how they affect the passing-on of the charge'.

<sup>797</sup> See discussion below on the 'specifically charged' tax in American cases *versus* that which is not specifically charged.



i.e.; that the amount of the overpayment of sales tax has not been passed on. Where the whole or a part of the economic burden of the sales tax may have been passed on indirectly through prices, the enquiry in this regard is likely to be complex.<sup>798</sup> The complexity arises because prices may be set with reference to a wide range of factors (including considerations of cost of production, competitive advantage, operational cash flow and consumer goodwill). Be that as it may, the starting point must always be the seller's pricing policy and practice.<sup>799</sup> In the context of European law, for example, Rudden and Bishop,<sup>800</sup> analysed, among others, the economic dynamics involved in the passing-on defence in regard to tax incidence both on the price of a product or commodity, the demand and supply features of the market for that product as well as the effect of such tax in the long-run should the business-person decide either to modify his supply behaviour according to the nature of competition for that product in the market. Leaving aside the economic technicalities of the analysis, a bare denial of the defence of passing on, say the authors, would assume that in real world there is a 'perfectly competitive market' for a given product, in which, staying in the extremes, (1) on the demand side, where (i) if there is a 'perfectly inelastic demand',<sup>801</sup> there would be a complete passing on, for a buyer would take the same quantity of a product whatever the price, and (ii) where there is a 'perfectly elastic demand',<sup>802</sup> there is no passing on,

<sup>798</sup> *Avon Products v Com for Taxation* [2006] HCA 29 (14/06/2006), (2006) 227 ALR 398, para. 9.; Benjamin Alarie (below); W. Woodward (1985) 39 *U Miami LR* 873, 885-6.

<sup>799</sup> See further below the discussion on mark-up pricing for additional details on pricing policies.

<sup>800</sup> B. Rudden & W. Bishop '*Gritz and Quellmehl: Pass It On*' (1981) *European LR* 243, 246-252.

<sup>801</sup> There is a 'perfectly inelastic demand' where buyers do not respond to price increase. In such a situation, the competitive price of the *victim's output* (the firm's output) will rise by the full amount of the inappropriate tax (or another overcharge). The firm/business continues to produce the original output without losing any profit. Put differently, there is in effect no injury, as the damage sustained equals zero. In this situation, in the same way that in an antitrust (competition) law an overcharge would clearly overstate the lost profits because there were no such lost profits, and compensating the victim who continued to earn a competitive return on his investment would overcompensate him, (see for examples (1999) 68 *George Washington LR* 1, 35); in an unjustified enrichment scenario, disallowing a passing on defence to the Government would grant a windfall to the complainant with an almost 'double recovery'.

<sup>802</sup> The effect in this scenario is the opposite of that outlined in the previous note: A 'demand is perfectly elastic' if any effort to raise price is futile, i.e.; buyers respond to price increase. The affected firm finds it optimal to reduce output. As a consequence, not only will this firm be paying more for the inputs, but as its output decreases, it will likely be producing the output in an inefficient manner. Said more technically, the cost increase is compounded by the unexploited economies of scale that result in the short run. As a consequence, the lost profits will exceed the 'tax inappropriately' charged (or any other overcharge). In this scenario, in an antitrust case, an overcharge under-compensates the victim. In an unjustified enrichment scenario, not refunding all of or at least part of the inappropriately charged tax to the claimant would result in loss to the claimant.

because the buyer would adjust the quantity bought in response to the price increase; and (2) on the supply side, (i) if there is a ‘perfectly inelastic supply’,<sup>803</sup> there would be no passing on, because a supply is ‘perfectly inelastic’ when the quantity offered for sale in the market is fixed and will not rise or fall at all, regardless of the price change; and (ii) if there is a ‘perfectly elastic supply’ of the product, there would be a passing on, because when supply is ‘perfectly elastic’ the seller will provide as much or as little as his customers wish to buy and will experience no change in his marginal costs of production.

Given that in real life such a perfect market rarely exists, what we ordinarily observe is the relative elasticity of both supply and demand, the extent of passing on, observe the authors, will also inevitably be ‘dependent on the ratio of the two variables: the elasticity of demand to that of supply’. Hence, the price rise, from which the plaintiff is said to have recouped his losses, will only have risen according to what is supplied; but because demand also varies with price, the buyers may also have bought less. As a sequel, the mere imposition of the tax does not explain the amount of loss that the claimant may have recouped by the price increase. Adding to the difficulties above in evaluating the exact amount passed-on, are the further possibilities of the so-called ‘passing-back’ or ‘backward-shifting’ on input prices, the possibility of a ‘monopoly-power’ in the market and the ‘long-run effects’ of any decision the claimant might have taken on the price increase. When all of these factors are taken together it becomes clear that the complexities involved in determining the amount of the passing-on become enormous, and the viability of the defence becomes cost ineffective should the claimant allege that what the authorities deem to be the amount passed-on is not what exactly was passed on considering all other variables of the market and ‘production’.

From this economic analysis, Rudden and Bishop concluded that ‘there are arguments both for and against the pure principle of ‘reducing compensation’<sup>804</sup> by the amount

<sup>803</sup> What is said in the previous two notes is applicable *mutatis mutandi* in the cases of supply being ‘perfectly inelastic’ and ‘perfectly elastic’, respectively.

<sup>804</sup> The authors use ‘compensation’ here because of the context in which the analysis was undertaken. In *Gritz and Quellmehl* cases (Cases No. 117/76 & 16/77, [1977] E.C.R. 1753 and [1979] 2 *C.M.L.R.* 445; Cases 103 and 145/77, [1978] E.C.R. 2037; [1979] 1 *C.M.L.R.* 675), the European Court of Justice did not have jurisdiction on the issue of private law - ‘*droit commun*’. The claimant could not reclaim their ‘levies’

passed-on. Both have merits and demerits.<sup>805</sup> Ultimately, the decision might be one of policy, instead of principle.

The analysis above shows the intricacies of advancing a passing on defence, as well as the pitfalls that are encountered if it is not allowed. Every legal system under discussion at one point or another of its development has faced the dilemma between favouring the government or the private citizen. Before discussing the application of the defence in the various jurisdictions, it is worth first highlighting some interfaces of the defence between public law and private law and note why some people think that the whole issue of recoverability of 'unlawfully' demanded imposts and the like should be the preserve of public law alone and private law should be ousted from this field altogether.

### 5.3. The Interface Public Law-Private Law in the Analysis of Passing on.

The defence of passing on also creates a problem of interface between public law and private law. Some authors defend the idea that the right to recover money paid under unlawfully imposed taxes should not be squeezed into the private law mould of unjustified enrichment, but that it should remain confined to the public law sphere<sup>806</sup> and

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under '*droit commun*' (*condictio indebiti*) or an (unjust enrichment) as they would be in the national courts; so the claim was instituted for 'compensation' under art. 215, paragraph 2 of the EC Treaty, i.e.; 'in accordance with the general principles common to the laws of the Member States'.

<sup>805</sup> Here is how the authors on pages 253-254 *verbatim* put their conclusion: 'If, on the theorems advanced above, there is no possibility of passing on, *cadit quaestio*: compensation equals refund; if however, the relevant model shows the possibility of passing on the burden, the following arguments suggest that compensation should be cut: (1) the purpose of the compensation is simply to make good a loss; (2) if compensation equals refund then (a) the applicants gets a windfall; and (b) this benefit will not be passed on in lower prices; (3) since, ex-hypothesis, downstream buyers have suffered loss, their claim is not stopped in *limine* by a large award to the initial producer'. 'But there are also arguments against the principle: (1) Permitting full recovery provides some incentive to producers to go to law. Where Member States infringe the Treaty, one of the reasons for holding its provisions directly applicable is that 'the vigilance of individuals interested in protecting their rights creates an effective supervision'. Why should not the Community's breach of the Treaty be subject to similar control? (2) Permitting full recovery saves the costs involved in establishing the extent of passing on. (3) Permitting full recovery is a reason for denying any action to those to whom part of the burden has been passed, whether backward if they are landlords or employees, or forward if they are downstream buyers' (253-254).

<sup>806</sup> J. Adler (2002) 22 *Legal Studies* 165, argues that the *Woolwich* principle should be regarded as a 'free standing public law principle enforceable in the Administrative court, broadly analogous to a legitimate expectation'. Similarly the judge in the Canadian case discussed below *Kingstreet Investments* expressed an equivalent view in rejecting the passing-on defence (paras. 13, 20, 40-45).

its recoverability, and ancillary issues, should be dealt with under administrative law principles. Where special courts are established for administrative issues, these are the appropriate venues for the resolution of the matter.<sup>807</sup> Other authors however see it as inherently a private-law matter because the acquisition of any 'benefit' not sustained by a justifiable ground is subject to the same principle.<sup>808</sup> Analyzing the grounds generally advanced to stop the public authority retaining the tax-money unlawfully 'received', public law defenders think that none of the reasons require a strong private-law right to restitution. This is so because all the reasons are primarily concerned to limiting government power, or 'preventing an abuse of power' and for that 'reason'/fact it can be concluded that all justifications point more to a '*prima facie*' obligation to disgorge the unlawful gain, but do not require the gain to be paid to any particular person as of right.<sup>809</sup> This being the case, the appropriate avenue under which the claim should be dealt with is public law and not private law. However, save exceptions and atypical cases, the great bulk of unlawfully demanded tax cases would fall under the 'conditional payment' facet of the unjustified enrichment doctrine. If the 'validity' of a basis (or consideration as the English sometimes put it) in the context of unjustified enrichment includes 'conditional payment', and the state of affairs contemplated as the basis or reason for the payment failed to materialise or, if it materialised or did exist, has failed to sustain itself or ceased to exist (e.g. a legislation found to be unconstitutional is void), it is also clear that the claim arising from such factual scenario embodies all the elements of a private-law claim compatible with the unjustified enrichment principles. For that reason, several authors argue in favour of dealing with the matter under private law, and

<sup>807</sup> R. Willins (2005) 16 *KCLJ* 199, for example, thinks that the existence of a public law action should exclude a private law one.

<sup>808</sup> Under this facet of the argument would be among others, for example, A. Burrows (2005) 121 *LQR* 540, 542-543 and J. Edelman (2005) 68 *MLR* 849, 851 who argue that there is no reason in principle why one unjust factor should exclude the other. This notion 'of one unjust factor excluding the other' is another manifestation of the instability of the those basing the search for reason why there should be restitution on identifying an 'unjust factor' instead of simply asserting that 'there was no basis' for the transfer, and that is the reason why the 'enrichment' should be reversed.

<sup>809</sup> J. Adler (2002) 22 *Legal Studies* 165, 170. This view technically amounts to saying that in such cases the courts should exercise discretion whether to sanction the case or not, depending on the circumstances and various other factors.

many cases<sup>810</sup> have indeed been decided under the private-law aspect of enrichment liability.

The following are, however, among the most important reasons advanced for the suitability of such matter under public law:

- (i) It is seldom encountered, and where it has been recognised it is some sort of a novelty, that a private-law right to recovery can be generated by a 'Bill or a Charter of Rights'.<sup>811</sup> Recovery of, say, an unlawful tax payment is almost invariably defended under the 'duress' or 'coercion' heading. Even if it is not clearly stated, this is still the idea underlying most of the claims;
- (ii) The costs generated by public action should be born by the public as a whole, or put differently, the public should bear the costs of actions of its representatives.<sup>812</sup> This contention is based on the argument of 'fiscal disruption' and the notion of 'burdening future generations'. The argument draws force from the supposed 'resulting unfairness' of burdening a new generation of taxpayers with the consequence of the acts of past governments. The rationale behind the argument is that if recovery is to be allowed in such circumstances, the government, having already spent the funds on projects, must now raise the amount to be recovered from the taxpayers in successive fiscal years to 'compensate' the claimant. Thus, the government can only raise such money by raising the tax burden of future generations, or finding

<sup>810</sup> See *Air Canada v British Columbia* (1989) 59 DLR (4<sup>th</sup>) 161 SCC discussed under Canadian law below and now partly overruled by *Kingstreet Investments* case also discussed below.

<sup>811</sup> For the novelty of the argument in the South African Bill of Rights context see *Carmichelle v Minister of Safety and Security* (2001) 4 SA 938 (CC), where the interface constitutional law and private law was considered, albeit not in the context of enrichment law.

<sup>812</sup> See the views expressed by Wilson J, a dissenting judge in *Air Canada v British Columbia* (1989) 1 SCR 1161, at 1215 and referred to with approval in *Kingstreet Investment v New Brunswick* (2007) 3 SCR 3, at par. 28. The argument suggests that the loss should be distributed fairly across the public. The contrary argument however sees it as burdening the same taxpayer twice, and enriching the undeserved 'business-person' (claimant) at the expense of innocent taxpayers.

alternative means to do so, such as sacrificing actual and viable projects.

- (iii) (iii) The right to repayment of such taxes arises because the citizen has a *prima facie* duty to obey a demand that appears to be valid, thereby generating a reciprocal obligation of repayment. This facet of the argument may raise the issue of competition between different aspects of the rule of law if the citizen, who performed, did so under protest or made it known he suspected the unlawfulness of a demand. The first aspect is that there is a strong presumption of validity in favour of government orders though its scope may not necessarily always be clear. Thus, because an order of 'government' is presumed to be a lawful one unless and until a court declares it invalid, when it can be treated as void *ab initio*, the citizen is under a duty to obey it. On the other hand, however, a strong presumption of validity which requires a person to obey an order and then challenge it in the courts, if he does so, affronts another aspect of the rule of law, namely the principle that an official who acts without proper legal power has no special standing and is not entitled to obedience.<sup>813</sup> This can be regarded as a buttress of a free society militating against deference to 'authority'. However, if a citizen suspected that the order was unlawful and nevertheless obeyed it, then this person can be seen as betraying the rule of law itself, because such a person is acknowledging an usurper and therefore undermining one of the main justifications for the existence of law, that of facilitating and coordinating the achievement of a common-goal;<sup>814</sup>
- (iv) (iv) The need to maintain an elementary value of justice to the citizen. This argument however, generates problems relating to the effective

<sup>813</sup> But contrast this with the view of J.E. Du Plessis (*Compulsion and Restitution* (2004) at 138) who argues that such tax claims 'are to certain extent accompanied by compulsion in the form of implied threat of penalties, litigation and even bad publicity – all considerations which may induce submission to the demand in the short term'. In this analysis such performance is regarded as involuntary.

<sup>814</sup> J. Adler (2002) 22 *Legal Studies* 165, 171.

conduct of government business and costs imposed on the community, for example, in the event of fiscal shortfalls<sup>815</sup> if the citizen has an absolute right to recover;

- (v) (v) The need to ensure that public authorities comply with the highest standard of conduct and probity. This aspect however seems to suggest no more than that the authority should have the discretion to repay since ethical behaviour presupposes an act of choice by an autonomous agent. Therefore the idea of probity seems redundant in the face of an automatic duty to repay;
- (vi) (vi) As a supplementary reason the fact that normally money paid out by the state/government can be recovered, it would also sound incongruent with legal norms and standard principles and therefore offensive if the citizen were not to enjoy a corresponding right;
- (vii) (vii) Finally, in the current constitutional and Human Rights instruments, which are becoming standard throughout the world, it is a requirement that an effective remedy be given for a violation of a substantive right.<sup>816</sup> If the unlawful exaction of tax-money infringes a citizen's fundamental right, an effective remedy must *ipso facto* be given, and a state or government that retains an unlawfully exacted

<sup>815</sup> See for example the Brazilian case *Usina Açucareira Passos* discussed below under 5.7 (Passing on in Brazilian law) and the line of the reasoning taken by the majority decision in defence of public finances.

<sup>816</sup> For Example under European Union several cases are increasingly being discussed under Art. 43 of the ECHR as the note below exemplifies. In the various domestic laws, the Constitutions themselves with strong provisions on people's rights or entrenched Bills of Rights do also provide a platform for such view. See also what the United States Supreme Court said in this regard in *McKesson v Division of Alcoholic Beverages* 496 US 18, 31110 L.Ed. 2d 17, 32 (1990): 'If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a post-payment refund action in which he can challenge the tax's legality, the Due process of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation'.

benefit from its citizens cannot be seen to still be complying with the Constitutional or Human Right standards.<sup>817</sup>

But it is also plain that the *ultra vires* doctrine fits into a private-law framework. It ordinarily reflects the 'liberal' version of the rule of law, which holds that governments as such have no power to alter legal relationships other than those conferred under positive law. And if one wants to maintain consistency in the legal system, there seem to be no plausible reason why the private law of enrichment should not be able to deal with such matters, if all the elements of a claim are satisfied.

Let us now consider the practical application of the defence or its direct or indirect invocation in the various jurisdictions under consideration.

#### 5.4. Passing on In English Law.

In English law, still hampered with the 'burden' of the unjust-factor approach despite its bold recognition of a general principle of enrichment liability, there are still at least three main theories advanced to decide whether a person who made a payment demanded by a public authority, *ultra vires*, may succeed by claiming restitution. The first is, in essence, that the basis of recovery should be limited to cases where the plaintiff paid money under duress or mistake. It is essential to note here that 'duress' and 'mistake' are among the clearest unjust factors entitling the plaintiff to recovery under English law. Under this

<sup>817</sup> For recent application of this aspect under the European Community law, specifically in the context of non-discrimination of citizen of EC citizens (or companies) due to their residence (art. 43 EC Treaty - the provision of right of freedom of establishment within the EC) see the facts and case of *Metellgesellschaft Ltd v IRC* [2001] Ch. 620 (cited under other EC publications as case C-397/98 & C-410/98). More recent claims made in the wake of this case are *Sempra Metals Ltd v IRC* [2004] EWHC 2387 (Ch) affirmed in [2005] EWCA Civ. 389 and further appeal at [2007] UKHL 34; *Pirelli Cable Holdings Ltd v IRC NV* [2003] EWCA Civ. 1849; *Deutsche Morgan Greenfell Group Plc* [2003] EWCA 1779 (Ch), reversed [2005] EWCA Civ. 78, and again appealed to the House of Lords (2006) UKHL 49, in which the appeal was allowed. See also comments by M. Chowdry & C. Mitchell (2005) *RLR* 1 at 15-16 for some of the issues raised in the cases. See equally the application of Art. 1 Protocol 1 of the European Convention of Human Rights in *Stretch v UK* [2004] 38 E.H.R.R. 12 and *Rowland v Environmental Agency* [2003] EWCA Civ. 1885 which inter alia clearly provide that the 'doctrine of *ultra vires* ... provides an important safeguard against abuse of power'. For a useful comment of these last cases see M. Elliott (2004) 63 *CLJ* 261.



first approach, recoverability is founded on the fact that mistake of law is no longer a bar to recovery.<sup>818</sup> Because mistake of law has been abolished, the once claimed exception employed in *Kiriri Cotton Co Ltd v Dewari*,<sup>819</sup> is now the normal rule if a claim encompassing mistake of law appears in court. There, Lord Denning, giving the judgment of the Privy Council said:

The true position is that money paid under mistake of law, by itself and without more, cannot be recovered back...If there is something more in addition to the mistake of law – if there is something in the defendant's conduct which shows that, of the two of them, he is the one primarily responsible for the mistake – then it may be recovered back. Thus, if as between the two of them the duty of observing the law is placed on the shoulders of the one rather than the other – it being imposed on him especially for the protection of the other – then they are not *in pari delicto* and the money can be recovered back.

The second approach advanced is equally founded on an implicit notion of duress or coercion.<sup>820</sup> Duress in this context is to be seen as some sort of a modified private law where a special standard should apply for government officials. It could be viewed as a unique enrichment category; i.e. the combination of breach of duty and the inherent coercion in a public authority's demand would render the payment involuntary and provide the basis for recovery. The third theory which is now mainstream in English law is based on the 'general enrichment principle' as defended earlier by Professor Birks,<sup>821</sup> though later Birks changed his stances slightly.<sup>822</sup> This theory sustains the position that

<sup>818</sup> *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 at 375. As explained in chapter three above, this case abolished mistake of law in English law, when the judge held that 'I would therefore conclude on issue No. 1 that a mistake of law rule should no longer be maintained as part of English law and that English law should now recognise that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution'.

<sup>819</sup> (1960) AC 192 (PC) at 204). In this case, the defendant required the plaintiff to pay an illegal premium for a tenancy. The plaintiff was allowed to recover the premium and retain the tenancy because it was decided that the policy underlying the illegality in such circumstances is the protection of those in need of rental accommodation from the risk of exploitation.

<sup>820</sup> For example Lord Keith in his dissenting judgment in the *Woolwich* case, after reviewing the English authorities had this to say: 'The mere fact a payment has been made in response to a demand by a public authority does not emerge in any of the cases as constituting or forming part of the *ratio decidendi*. Many of the cases appear to turn upon considerations of whether the payment was voluntary or involuntary. In my opinion, it simply involves that the payment was voluntary if no improper pressure was brought to bear, and involuntary if it was.' Obviously, this proposition was contrasted in the case by the majority judgment by Lord Goff, whose view is mentioned below.

<sup>821</sup> (1981) *Current Legal Problems* 291.

<sup>822</sup> P. B. H. Birks 'Restitution From the Executive' in PD Finn (ed) *Essays in Restitution* (1990), Ch. 6; and finally in P. B. H. Birks [1991] *LMCLQ* 473, 497ff.

‘money paid by a citizen to a public authority pursuant to an *ultra vires* demand is prima facie recoverable by the citizen as of right, and that right to recover should require neither mistake nor compulsion’.<sup>823</sup> This principle, widely referred to as ‘the *Woolwich* principle’, recognises a new policy reason for restitution in order to give substance to the constitutional principle enshrined in the Bill of Rights 1689 art. 4, that the Crown and its ministers must not levy taxes without parliament’s sanction,<sup>824</sup> or more broadly, to give substance to the public law principle of legality, that the bodies invested with powers by the State must respect the rule of law and must adhere to the limits of the jurisdictions conferred upon them.<sup>825</sup>

These three approaches to *ultra vires* tax issues reveal the tension still existing in English law about the foundation of enrichment law itself. This is captured in two different models of unjust enrichment law, one enshrined in the need to prove in all cases an unjust factor while the other model leans towards the absence of basis. Under the model based on the ‘unjust factor’ approach in all and any enrichment claims, the claimant must show three things to make out an entitlement to restitution on an unjust enrichment ground. First, he must show that the defendant was enriched. Secondly, that the enrichment was gained at the expense of the claimant and thirdly that the defendant’s enrichment is unjust. This third requirement (which for this argument’s sake is the most important), does not mean that the court has a discretionary power to order repayment whenever it seems just and equitable to do so in the circumstance of the particular case.<sup>826</sup> The claimant must bring him/herself within a recognised ground for restitution. This model of law is currently supported by a significant body of judicial opinion.<sup>827</sup> The other model, however, holds that a claimant seeking restitution on the ground of unjust enrichment must show that a defendant has been enriched at his expense, and that there is no legal ground for the defendant’s enrichment. In his last book, Peter Birks argued that English

<sup>823</sup> *Woolwich Equitable Building Society v IRC* [1993] AC 70 (HL) 101 (p173 (per Lord Goff).

<sup>824</sup> (1993) AC 70, 172 (per Lord Goff).

<sup>825</sup> (1993) AC 70, 198 (per Lord Browne-Wilkinson).

<sup>826</sup> *Kleinwort Benson Ltd v Birmingham CC* [1997] QB 380 (CA) (per Evans LJ).

<sup>827</sup> Just few citation of cases that hold this view: *Banque Financière de la Cité v Parc (Batersea) Ltd* [1999] 1 AC 221, 227 (Lord Steyn); and 234 (Lord Hoffmann); *McDonald v Coys of Kensington* [2004] EWCA Civ 47; *Niru Battery Manufacturer Co v Milestone Trading Ltd* (No.2) [2004] EWCA Civ. 487; [2004] 2 Lloyd’s Rep 319, Par. 28 and 41 (per Clarke LJ).

law was committed to this model by certain cases concerned with the recovery of payments under void but fully executed interest rate swap contracts.<sup>828</sup> And Birks was not alone in this assertion. Various judicial pronouncements have already taken this approach, at least in special areas.

The tension between the two approaches is further heightened by a recent decision of the Court of Appeals in *ICR v Deutsche Morgan Grenfell*<sup>829</sup> in which that Court recognised that claims for restitution of something paid by mistake can only arise by reference to particular statutory provisions<sup>830</sup> or at common law by virtue of the *Woolwich* principle. In reaching this decision, the Court of Appeal drew distinction between public and private restitutionary claims and recognised that, for the recovery of overpaid taxes at least, restitution occurs by virtue of a specific public law regime which is distinct from the private law regime which governs the bulk of the law of unjust enrichment. Apart from establishing a dichotomy between public law and private law regimes, a division that several English authors doubt whether it is necessary or desirable,<sup>831</sup> the case also points to the issue of mistake of law in the claimant's attempted escape from the time-bar to bring the case within the provisions of the Limitation Act 1980, S 32(1) (c) for which

<sup>828</sup> P. B. H. Birks, *Unjust Enrichment*, 2<sup>nd</sup> Ed. (2005) ch. 5. See criticisms of P. B. H. Birks' approach inter alia by R. Stevens and T. Krebs [2004] *RLR* 270-276. The 'absence of basis' approach has already made deep inroad in English case law. For example *Criterion Property Ltd v Stratford Property UK Ltd* [2004] UKHL 28; [2004] 1 WLR 1846, par. 4 (Per Lord Nicholls); *Kleinwort Benson Ltd v Sanwell BC* [1994] 4 All ER 890; *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349 (Per Lord Hope).

<sup>829</sup> [2005] EWCA Civ. 78 (2005), (2005) STC 329.

<sup>830</sup> These tax provisions are essentially embodied in the following Acts: (i) Tax Management Act 1970 section 33 (which provides for the recovery of overpaid income tax, corporation tax, capital gains tax and petroleum revenue tax); (ii) Inheritance Tax Act, section 241 (which provides for the repayment of overpaid Inheritance tax); (iii) Finance Act, section 29 (which provides for the repayment of overpaid excise duty and car tax); (iv) Value Added Tax Act 1994, section 80 (which makes provision for the recovery of overpaid VAT). This last Act must now be read as Amended by the Finance Act 1997 sections 46-47 and by the further amendment by section 3 of the Finances (No. 2) Act of 2005. This extends the operation of the unjust enrichment defence to claims for credit of overpaid VAT rather than confining it to cases where the tax has been overpaid. For further details on these tax enactments see G. Virgo, *The Principles of The Law of Restitution* 2<sup>nd</sup> Ed. (2006) 412; M. Chawdry & M. Mitchell (2005) 13 *RLR* 1, 1-17.

<sup>831</sup> See for example G. Virgo, *The Principle of the Law of Restitution* 2<sup>nd</sup> Ed. (2006) 412-414. Both, A. Burrows (2005) 121 *LQR* 540, 542-3 and J. Edelman (2005) 68 *MLR* 849, 851 argue that there is no reason why one unjust factor should exclude the other, and therefore the fact that the claim exists in public law, does not mean private law in this field should be excluded.

time only starts to run when the mistake is or could have been reasonably discovered.<sup>832</sup> One must remember here that mistake of law is no longer a bar to recovery under English law,<sup>833</sup> and the *Woolwich* principle itself does not depend on the ground of mistake.

Given the complexities and the potential impact of a general right to recover affirmed by the *Woolwich* principle, the English Law Commission felt the need to protect public finances and recognised such need as a legitimate policy aim<sup>834</sup> which is justified because in certain cases the amount of tax or charge which might be repaid could amount to millions of pounds. A blunt restitutionary right could prove to be disastrous to the public authority and the relevant projects which it finances. Consequently, although the Law Commission rejected a general defence of serious disruption to public finances<sup>835</sup> on the ground that such a defence would be too uncertain in operation, it nevertheless recommended the creation of four specific defences to protect public authorities against serious fiscal disruption.<sup>836</sup> The four specific defences recommended by the UK Law Commission in this regards are: (i) failure to exhaust statutory remedies, (ii) change in the settled view of the law,<sup>837</sup> (iii) compromise,<sup>838</sup> and (iv) unjust enrichment.<sup>839</sup>

<sup>832</sup> In brief, the facts in *ICR v Deutsche Morgan Grenfell* were that the claimant sought a restitutionary remedy in the form of interest in respect of taxes which it had paid too early. Some of these taxes had been paid more than six years before the claim was brought. Therefore the claim was time-barred unless the claimant could found the claim on a mistake of law for which time would not begin to run until the mistake could reasonably have been discovered.

<sup>833</sup> *Kleinwort Benson v Lincoln City Council* [1999] 2 AC 349 (HL) 349, 382.

<sup>834</sup> Law Commission, *Restitution: Mistake of law and Ultra Vires Public Authority Receipt and Payments* Law Com. Report No. 227 (1994) paras 10.5 -10-8).

<sup>835</sup> See the Canadian case *Air Canada v British Columbia Ontario* (1989) 1 SCR 1161, (1989) 59 DLR (4<sup>th</sup>) 161 that recognised such issue as fundamental to the acceptance of the defence of passing on. The case is now overruled by *Kingstreet Investments v New Brunswick* (2007) 1 SCR 3 as discussed below. Contrast this, however, with the view being adopted or retained in the American *New Restatement (Third) of Restitution and Unjust Enrichment*, section 19, Tentative Draft No. 1 (2001), which provides that a tax payment is retrievable unless repayment would threaten the stability of the public finances.

<sup>836</sup> G. Virgo, *The Principles of the Law of Restitution* 2<sup>nd</sup> Ed. (2006) 421.

<sup>837</sup> It was recommended that the claim be denied on this ground if restitution is founded on a mistake of law where the payment was made in accordance with a settled view of the law that the money was due and that view was subsequently changed by a decision of a court or tribunal. See equally for support for such a view the judgment of Lord Goff in *Kleinwort Benson Ltd v Lincoln CC* [1999] 2 AC 349, 382. For criticisms of the validity of this ground of defence see G. Virgo, *The Principles of the Law of Restitution* 2<sup>nd</sup> Ed. (2006) 421.

<sup>838</sup> Restitution is to be denied on this ground (compromise) where the restitutionary claim has either been contractually compromised or where the payment was made in response to litigation which had been commenced by the public authority, but not where the litigation was merely threatened. Such a defence of compromise is consistent with the general bars to restitutionary claims at common law founded on the

In sum, English law objectively does not recognise the defence of passing on in its private law in order to maintain consistency within its unjust enrichment doctrine. However, despite its affirmed willingness to uphold the rule of law and respect for its constitutional principles, it can still be queried whether that will hold for long, as the ‘disguised’ assertion that such matters be dealt with under public law alone, will ultimately sanction a passing on defence by statute, if it has not happened already.

## 5.5. Passing on In Canadian Law.

### 5.5.1. *Introductory Remark.*

In the study of the Canadian defence of passing on and its enrichment law in general one is now bound to take notice of two different evolutionary ‘ages’: Pre-2007 and Post-2007 that for convenience’ sake I shall call *Pre-Kingstreet* and *Post-Kingstreet*, as its jurisprudence finally put to rest the symmetry requirement of gain-loss in enrichment arena.

### 5.5.2. *Passing on prior to 2007 - The Air Canada v British Columbia Approach.*

We have seen from the outset that for a plaintiff to succeed in the Canadian enrichment law he must successfully prove four requisites in his claim: (i) an enrichment to the defendant; (ii) a corresponding deprivation to the plaintiff, (iii) an absence of juristic

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claimant’s voluntary submission to an honest claim. This recommendation is based on the settled position in English law that ‘where the claimant settles or compromises’ (*Ward and Co v Wallis* [1900] 1 QB 675; see also Andrews (1989) *LMCLQ* 431, 432-435) the plaintiff’s claim for payment will be barred from obtaining restitution from the defendant because of the policy of the law to uphold the settlement of the claim. Thus, a settlement constitutes a bargain between the parties and should only be invalidated in extreme circumstances, namely where the contractual test for mistake can be regarded as satisfied, in other words, where there is a shared fundamental mistake, or where the defendant induced the settlement by fraud, undue influence or absence of good faith (for the notion of ‘duress’ see J. Beatson (1974) *CLJ* 97, 103 and for ‘fundamental mistake’ see *Brenan v Bolt Burdon* [2004] EWCA Civ. 1017, [2005] QB 303.

<sup>839</sup> Unjust enrichment in this context is exactly another way of saying that the state will not tolerate a situation whereby a plaintiff gains a windfall without justification. It certainly includes the aspect of passing on.

reason for the defendant's enrichment, and (iv) there must be no defence to such a claim.<sup>840</sup> If the plaintiff proves each of the first three elements, he is presumptively entitled to relief. His claim however may be ultimately defeated to the extent that the defendant is able to invoke a defence, as indicated, at the fourth stage of the enquiry. When one analyses all the relevant defences in unjust enrichment, as was done in chapter two above, one will quickly realise that almost all of them operate by demonstrating that, notwithstanding initial appearances, either the defendant was not truly enriched or the plaintiff did not 'truly suffer a corresponding deprivation'. The passing-on defence in Canadian context is ordinarily to be seen as an example of a case where the plaintiff 'did not truly suffer a corresponding deprivation', for allegedly having recouped his loss by shifting it to the customers.

Though unjust enrichment claims against public authorities in Canadian law did and perhaps still do sometimes succeed where none of the established grounds of restitution appear to be or to have been applicable, the real success of these claims is thought to be or to have been justified by reference to an independent ground of restitution which is peculiar to enrichment claims against public authorities.<sup>841</sup> Other cases however, generally rejected a general right of restitution founded on the receipt of *ultra vires* payment, primarily because of the fear that allowing restitution for this reason would unsettle public finances<sup>842</sup> and until very recently the leading cases in Canadian law rejecting such a general right to recovery and consequently affirming the passing-on defence were still *Air Canada v British Columbia*<sup>843</sup> and *Air Canada v Ontario (Liquor Control Board)*.<sup>844</sup> These cases are now to a certain extent superseded by *Kingstreet Investments v New Brunswick*.<sup>845</sup> But they haven't been superseded in all respects, hence the importance of looking at *Air Canada v British Columbia* and *Air Canada v Ontario*

<sup>840</sup> See generally M. McInnes (2002) *Univ. Toronto LJ* 163, 164-168 and other references discussed under the Canadian change of position defence in chapter 3 above.

<sup>841</sup> Old examples cited in this regard are *Steel v Williams* 155 ER 1502; *South of Scotland Electricity Board v British Oxygen Co Ltd* [1959] 1 WLR 587; *In Re GST (Good and Services Tax)* (Can) (1992) 2 SCR 445.

<sup>842</sup> See G. Virgo, *The Principles of The Law of Restitution* 2<sup>nd</sup> Ed. (2006) 408 for some earlier cases.

<sup>843</sup> [1989] 1 SCR 1161; (1989) 59 DLR (4<sup>th</sup>) 161 SCC.

<sup>844</sup> [1997] 2 SCR 581.

<sup>845</sup> [2007] 1 SCR 3 (2007) SCC 1.

<sup>845</sup> See G. Virgo, *The Principles of The Law of Restitution* (2006).

first. Notwithstanding the fact that the approval of the defence by the Canadian Supreme Court appeared only in a non-binding comment from La Forest J, with whom two other members of the Court concurred, namely Lamer and L'Heureux-Dube JJ, La Forest's assertion in *Air Canada v British Columbia* became the cornerstone of that defence in Canadian law. That assertion reads as follows:

'The law of restitution is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either in his possession or would have accrued for his benefit, it is restored to him. The measure of restitutionary recovery is the gain the Province made at the Airlines' expense. If the Airlines have not shown that they bore the burden of the tax, then they have not made out their claim. What the Province received is relevant only insofar as it was received at the Airlines' expense'.

The majority of the Court rejected the claimant taxpayers' claim to recover *ultra vires* payments for three main reasons: (i) if the enrichment claim was allowed to succeed the State would need to recover the money from a new generation of taxpayers who had not been benefited from the provision of State services funded by the tax; (ii) arranging for the repayment to the original taxpayers and issuing new tax demands would be economically inefficient; (iii) a further consequence of repaying tax to the original taxpayer would be to disrupt public finances.

Notwithstanding the clarity and force of these arguments, one member of that Court (Wilson J) still dissented, and held that these reasons should not prevent the acceptance of a general right of recovery. In the dissenting judge's view (a view also defended now by many other authors<sup>846</sup>) the general dangers above mentioned should be dealt with by

<sup>846</sup> Other authors then defending the same principle were W. Cornish (1987) *JMCL* 41; P. B. H. Birks, 'Restitution from the Executive: A Tercentenary Footnote to the Bill of Rights' in Finn (ed) *Essays in Restitution*, chapter 6. More recently G. Virgo, *The Principles of The Law of Restitution* 2<sup>nd</sup> Ed. (2006) 409-410; B. Alarie 'Kingstreet Investments: Taking a Pass on the Defence of Passing on' (October 2007) (University of Toronto). The Paper is available online in pdf format at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_ID1023789](http://papers.ssrn.com/so13/papers.cfm?abstract_ID1023789). Alarie agrees that in principle there should be a general right to recover and the defence of passing on is in principle defensible, but for policy and economic reasons it should not be applied. He analyses passing on from an economic perspective.

developing specific defences for the protection of public authorities where the greater public good requires such protection.<sup>847</sup>

In 1997 the Supreme Court of Canada considered similar case in *Air Canada v Ontario (Liquor Board)*<sup>848</sup> for the possible recovery of unconstitutional taxes through the doctrine of unjust enrichment. In brief, the facts of this new case were that in 1984, an Airline drew to Ontario's (Provincial Authority) attention the probable unconstitutionality of a statute requiring the airline to pay alcohol-related fees to the Province. Ontario agreed to stop collecting the fees from that airline on the condition that the airline did not disclose to other airlines that this was occurring. When the arrangement was eventually discovered, other airlines successfully challenged the constitutionality of the legislation. The court below held that the airlines were entitled to restitution of some of the fees, as the airlines had proven they did not pass the costs to the passengers. However the Court of Appeal only ordered restitution of the fees collected after 1984 on the basis that prior to that date the airlines and the Province were *in pari delicto*. The SCC unanimously ordered restitution of all the fees collected.

The basis of the Supreme Court's decision in this second case was that there was no rule in Canadian law that only fees collected by a government agency who knew that a law was unconstitutional could be recovered. The court reasoned that the 'responsibility of ensuring the constitutional applicability of a law lies with the governmental agency in charge of administering the law, not the tax payer'.<sup>849</sup>

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<sup>847</sup> *Air Canada v British Columbia* [1989] SCR 1161 at 1214-19. Among other things, Wilson J also held as follows: 'Why should the individual taxpayer, as opposed to taxpayers as a whole, bear the burden of government's mistake? I would respectfully suggest that it is grossly unfair that X, who may not be (as in this case) a large corporate enterprise, should absorb the cost of government's unconstitutional act. If it is appropriate for the courts to adopt some kind of policy in order to protect government against itself (and I cannot say that the idea particularly appeals to me) it should be one which distributes the loss fairly across the public. The loss should not fall on the totally innocent taxpayer whose only fault is that it paid what the legislature improperly said was due'[at p. 1215].

<sup>848</sup> (1997) 2 SCR 581.

<sup>849</sup> For detailed analysis of this case and the Canadian law to that point see the comments out of the bench by Beverley McLachlin, a member of the Supreme Court of Canada in B. McLachlin, 'Restitution and the Legislature in Canada' in W. Cornish et al (eds) *Restitution, Past, Present and Future* (1998) 288.



It is to be remembered that Canadian enrichment law requires a correlation between loss and gain. It would also appear that because of that correlation, Canadian law demands that not just an initial financial deprivation to the claimant, but a financial deprivation which is persistent. If the claimant later makes good his losses, restitution will be denied. However, it is still to be seen whether this position will survive the recent *Kingsstreet Investments* case which is immediately discussed below.

### 5.5.2. Passing on after 2007 -- The *Kingstreet Investments*' Approach.

As currently understood, Canadian law has firmly rejected the defence of passing on in the context of *ultra vires* taxes. The reasons for such rejection, according to the Supreme Court in *Kingstreet Investments*<sup>850</sup> are mainly three: (i) the defence is inconsistent with the basic premise of 'restitution law' (unjust enrichment); (ii) the defence is economically misconceived;<sup>851</sup> and (iii) it creates serious difficulties of proof as there are inherent difficulties in a commercial marketplace of proving that the loss was not passed on to consumers.<sup>852</sup> Before the court arrived at this conclusion which all the nine Supreme

<sup>850</sup> (2007) 1 SCR 3, paras. 44-45. In the *Kingstreet Investments* litigation the specific levy (tax) at issue in the appeal was a user charge, ranging over the years from 5 per cent to 11 per cent, imposed by the New Brunswick Liquor Corporation on sales of alcoholic beverages to licencees through the Corporation's outlets. The plaintiff, *Kingstreet Investments and 501638 MB Ltd* had operated night clubs in the areas of Fredericton and Mocton, New Brunswick since 1988. Over the years, they paid more than \$ 1 million in user charges, which with interest amounted to a sum close to twice the principal amount. At trial the plaintiff challenged the constitutional validity of the charge arguing that it was *ultra vires* the Province (the Provincial Authority) on the basis that it was an indirect tax. The Canadian Constitution permits Provinces to impose only direct taxes. In defence, the Province argued that if the user charge was an indirect tax, then although the tax was *ultra vires*, the plaintiff should have no remedy since the incidence of the tax fell on the nightclub and bar patrons. In other words, the Province argued that the plaintiff had passed-on the user charge and had therefore experienced no compensable loss. On appeal, the Province did not contest the conclusion that the user charges were indirect taxes, and therefore *ultra vires*. Having conceded the illegality of the charge as an indirect tax, the nightclub's appeal focused only on the appropriate remedy in the light of the unconstitutional nature of the levy. The Court of Appeal accepted that the passing-on defence should preclude recovery for the user charge paid prior to the commencement of legal proceedings, but allowed recovery of the user charge paid under protest and compulsion. On further appeal, the Supreme Court by unanimity of a 9-0 decision, rejected the passing-on defence.

<sup>851</sup> For detailed discussion of the 'economically misconceived' reason see B. Alarie, '*Kingstreet Investments*: Taking A Pass on the Defence of Passing On' (October 2007) available at the University of Toronto 'Social Science Research Network Center (SSNR) – Electronic Paper Collection' at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1023789](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1023789).

<sup>852</sup> *Kingstreet Investments Ltd v New Brunswick* (2007) 1 SCR 3, paras. 42, 44, 47-48.

Court judges unanimously agreed with, it considered the previous view in *Air Canada v British Columbia* that held that the ‘law of restitution is not designed to confer windfalls to plaintiffs who suffered no loss’ and replaced it with a new version that ‘the law of restitution is not concerned by the possibility of the plaintiff obtaining a windfall because it is not founded on the concept of compensation for loss’.

While this assertion is sound to defeat a defence of passing on, its implication in the context of unjust enrichment in general is that one must now start questioning the correlation gain-loss that is entrenched in Canadian law and therefore the measure of recovery itself. As was explained earlier in this chapter, the defence of passing on would seem to encounter a more fertile ground in a legal system that requires a correlation gain-loss than one that does not require such correlation. Canadian law in the past few decades seemed to defend such correlation, but when faced with its applicability in the context of the passing-on defence, it subtly departed from it.

The three reasons advanced by the judge seem to be more concerned with policy rather than principle. As a decision firmly grounded on policy, it may actually embody some other contradictions in principle. The decision recognises that all the elements of an unjust enrichment claim are present in the cases of *ultra vires* taxes and for that reason the judge ordinarily has no discretion but to grant the relief prayed; however, the Court also concludes that ‘the ordinary principles of unjust enrichment should not be applied to claims for the recovery of monies paid pursuant to a statute held to be unconstitutional’.<sup>853</sup> In support of that contention the judge continues that ‘restitution for *ultra vires* taxes does not fit squarely within either of the established categories of restitution. The better view is that it comprises a third category distinct from unjust enrichment’.<sup>854</sup>

<sup>853</sup> *Kingstreet Investments Ltd v New Brunswick* (2007) 1 SCR 3, para. 39.

<sup>854</sup> *Kingstreet Investments Ltd v New Brunswick* (2007) 1SCR 3, para. 40. With some historical remarks the Court also found that ‘[a]ctions for recovery of taxes collected without legal authority and actions of unjust

In sum, Canadian law has now rejected both the passing-on defence and its mirror-image requirement gain and loss, because an *ultra vires* law can never constitute a 'juristic reason' for the State.

## 5.6. Passing On In American Law.

### 5.6.1. *Introductory Remark.*

Like change of circumstances defence, the passing-on defence in the United States of America has been discussed for a long time. Its desirability or otherwise is examined in at least two areas, namely the private law of restitution itself and in antitrust (competition) law. The brief presentation below follows the same approach.

### 5.6.2.. *Passing on in Unjust Enrichment Law.*

The law of the United States of America, unlike that of Canada, does not endorse the view that restitution needs necessarily be restricted by the net financial loss suffered by the claimant. Therefore, some of the considerations encountered in Canadian enrichment law do not find fertile ground in American law. However, it has long been acknowledged that the policy considerations behind the law of unjust enrichment imply denying a plaintiff relief if that relief creates 'unjust enrichment' for the plaintiff.<sup>855</sup> Because the

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enrichment both address concerns of restitutionary justice, but these remedies developed in our legal system along separate paths for distinct purposes. The action for recovery of taxes is firmly grounded, as a public law remedy in a constitutional principle stemming from democracy's earliest attempts to circumscribe government powers within the rule of law. Unjust enrichment, on the other hand, originally evolved from the common-law action of *indebitatus assumpsit* as a means of granting plaintiff relief for quasi-contract damages'. Additional authorities for this proposition are cited in the case itself.

<sup>855</sup> Cf. *Restatement (Second) of Restitution*, Topic 3, Introductory Note at 157 (Tentative Draft No. 1 (1983)). There might be some changes operated here in the New *Restatement (Third) of Restitution*, which is still under discussion. Thus far section 19 of Tentative Draft No.1 (2001) as already cited above, is devoted to the recovery of disputed tax payments, and it generally provides that a tax payment is retrievable unless repayment would threaten the stability of the public finances or 'public fisc', as M.P. Gergen puts it (see M.P. Gergen (2005) 13 *RLR* 225 at 229 notes 28 and 29).

central policy underlying the law of unjust enrichment is precisely to avoid or to prevent unjust enrichment, a court judgment in this branch of law that ‘unjustly enriches’ a plaintiff would be self-defeating.

Given the possibility of conflicting principles, some commentators advance a cautious clarification note to the assertion above. Hence, Woodward thought that such doctrinal explanation of the defendant’s victory should not be confused with an explanation that sanctions the defendant’s enrichment through an illegal purpose. He explains that this notion ‘is conceptually very different from one that justified a defendant’s victory on the basis that the illegal tax does not unjustly enrich the defendant’. That is so because ‘a defendant successfully deploying the ‘unjust enrichment of the plaintiff’s defence’ will not win because the defendant was not unjustly enriched; he will win because the cure – an award of restitution to this plaintiff – would be no better than the disease.’<sup>856</sup> Hence, denying recovery on the grounds of unjust enrichment of the plaintiff’ seems most accurately to reflect the dynamics of these tax cases themselves.

Despite the apparent clarity of the explanations above, in practice, however, the American position on passing on is somewhat ambivalent and at the same time very diverse. Commenting on an enrichment arising from ‘improperly’ charged taxes, George Palmer, two decades ago, succinctly put the matter this way:

There is no doubt that if the tax authority retains a payment to which it was not entitled it has been unjustly enriched. It has not been enriched at the taxpayer’s expense, however, if he has shifted the economic burden of the tax to others.<sup>857</sup>

Under what circumstances can it be said that the plaintiff did not shift the economic burden of the tax to others? The answer may be very complex and the enquiry to

<sup>856</sup> W. Woodward (1985) 39 *U Miami LR* 873, 911. See the similarity of this reasoning with the Brazilian argument discussed below, at 5.7 which is essentially premised in finding a dilemma in the factual scenario.

<sup>857</sup> G. E. Palmer, *The Law of Restitution*, revised supplement (Boston 1986) 255. Palmer is essentially echoing here a Federal statutory approach that technically had overridden the common-law approach. In this regard Statute 26 USC § 6416(1)(A) (1984) required a taxpayer seeking refund had to demonstrate that it ‘had not collected the amount of the tax from its customers’. This mechanical approach is said to establish that the intermediary has suffered ‘no loss’.

understand all such circumstances may be futile but one thing is clear: in order for a defendant successfully to advance passing on, he must allege that the plaintiff did not bear the burden of such taxation and the onus is on the plaintiff to prove that he did. Whether one wants it or not, this exercise seems to be premised on finding whether one has suffered a loss or not.<sup>858</sup>

Meanwhile, unlike other jurisdictions that may not have a long tradition on passing on defence, American law has a longstanding jurisprudence on the issue dating back at least from 1916 in the case of *William C van Antwerp v State of New York*.<sup>859</sup> The same jurisprudence was adopted indirectly two decades later by the US Supreme Court in an *obiter dictum* in *United States v Jefferson Electrical Manufacturing Co.*<sup>860</sup> But in between these two cases the US Congress slightly changed direction through legislation in the Revenue Act (US) 1928 section 424(a).<sup>861</sup> This Act denied recovery to any claimant who did not bear the burden of the unlawful tax. In the Act the Congress required claimants seeking refunds, for example, of Automobile Accessories Tax, to establish affirmatively that they had ‘borne the burden’ of the tax. Ever since, this federal legislation has had a profound influence on subsequent decisions of State courts. In circumstances where state governments were slow to introduce a statutory defence of passing on, state courts filled the gap. The defence thereby became part of the landscape of the common-law of the United States. But pockets of resistance to the common-law introduction of the defence of passing on did, however, remain<sup>862</sup> and today it is still possible to encounter some ambivalence in the application of the defence in some States. There are instances in which the defence is rejected outright. A second string of cases presents more ambivalence by either rejecting the defence on technical grounds or

<sup>858</sup> This is what W. Woodward calls the mechanical approach, which is aimed to establish that the intermediary has suffered no loss.

<sup>859</sup> 218 NT 422 (NYCA, 1916). See also *Wayne County Produce Co. v Duffy-Mott* 244 N.Y. 351, 155 N.E. 669 (1927).

<sup>860</sup> 291 US 386 (1934) 401-403. In this case the US Supreme Court referring to the 1928 Tax Act said that ‘statutes providing for refund and for suits on claims proceed on the same equitable principle that underlies an action in *assumpsit* for money had and received’.

<sup>861</sup> Revenue Act of 1928, 45 Stat. 886 (1928).

<sup>862</sup> See generally M. Rush, *The Defence of Passing on* (2006) 53.

accepting it with qualification. The third approach is represented by those cases in which it is directly accepted with no qualification.<sup>863</sup>

One often contentious issue in the application of the passing-on defence in American law is the concept of 'specifically charged restriction' against a 'lump-sum' charge. For some judges<sup>864</sup> and commentators<sup>865</sup> where the claimant has 'specifically charged the tax', i.e. it is clearly said that the price is  $X$  plus *tax*, in principle, the defence of passing on would be available, and where a lump-sum price was charged, the defence would be defeated. The corollary of these analytical issues is also the problem as to whether the customers to whom the burden was passed are readily identifiable or it is impossible to identify them. And even if they are readily identifiable or unidentifiable, the other question that must be asked in such circumstances is whether the plaintiff is seeking recovery in his own right or on behalf of his customers. If one asserts that the plaintiff is just an intermediary seeking recovery on its customers' behalf, one gains the impression that at issue is the image of an intermediary simply passing on the recovery and deriving no benefit from it. However, the reality of life is certainly different from this imagination. The scenario is even murkier because the customers, as ultimate taxpayers, are usually barred from claiming directly from the government as of right that which they paid in overcharge to the plaintiff. So, if the plaintiff is said to be claiming on his customers' behalf, the likelihood is that such customers, in the event they are identifiable, will have pledged to pay something to the claimant to act on their behalf, (such something can be money, firm future business, higher future prices, good-will, etc, which might ultimately amount to as much as the value of the illegal tax paid) in exchange for getting the proceeds of the recovery.<sup>866</sup> This reflection shows that the defence of passing on denies restitution to the

<sup>863</sup> See again M. Rush, *The Defence of Passing on* (2006) for details of these three positions. For an in depth discussion of older Tax cases see Bondurant (1939) 37 *Michigan LR* 357; Johnson (1937) 37 *Columbia LR* 910; Field (1932) 45 *Harvard LR* 501; W. Woodward (1985) 39 *U Miami LR* 873 at 885-907 (part III of his article) offers a thorough analysis of various facets of passing on in various American cases.

<sup>864</sup> See Judge Hand's dissenting judgment in *123 East Fifty-Fourth Street* 157 F.2d (2d. Cir. 1946) for more details on this view. *Herbert Nelson v Appleyway Chevrolet Inc.* Case No. 77985-6 (April 26, 2007) (Supreme Court of Washington State) and *Sprint Spectrum v City of Seattle* 113 Wn. App 339, 127 P. 3d 755 (2006).

<sup>865</sup> M. Rush, *The Defence of Passing on* (2006) 217; B. Sweeney (2006) *Melbourne U LR* 26.

<sup>866</sup> See the example given by W. Woodward (1985) 39 *U Miami LR* 873, 903 footnote 139 as well as the inefficient outcome of the class action in M. Rush (supra) 217-218. See equally the economic analysis of B.

plaintiff because of the existence of third-parties' rights that the courts perceive to be stronger than the right of the plaintiff.<sup>867</sup> Briefly stated one can say that because what is really at stake in the recovery of unlawfully charged taxes is the dilemma to prevent both the government to enrich itself by infringing the very law it is expected to protect and thwart plaintiff's undeserved windfall that he would gain at the expense of the innocent ultimate taxpayers without having borne any financial burden (or any loss). The dilemma is often resolved on policy grounds that may resemble the adage 'as between 'two innocents', the position of the defendant is to be preferred'.

Similar to the Brazilian approach discussed below, American courts sometimes deny recovery and apply the defence of passing on because events extraneous to the transaction between the intermediary and the government (i.e., the plaintiff passing on the tax) have divested that plaintiff of the rights he otherwise might have had. Consequently, by framing the question as whether the recovery sought would result in the claimant's unjust enrichment, it properly redirects our attention from the defendant and the manner in which the defendant acquired the enrichment to the plaintiff and to the results that might follow a judgment in favour of the plaintiff.<sup>868</sup> So in these cases, an appropriate plaintiff which met other requirements for recovery and did not pass on the tax would be entitled to recover the illegal tax. Where the plaintiff has passed on the tax, the government, it is said, has not strengthened its own case for retention of the illegal tax-money. Instead, the original balance of equity favouring the intermediary has shifted because of the intermediary's unilateral action in charging his customers the tax.

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Alarie (supra) in the Canadian context and the complexities of tax incidence on passing on defence at [http://papers.ssrn.com/so13/papers.cfm?abstract\\_ID1023789](http://papers.ssrn.com/so13/papers.cfm?abstract_ID1023789). But see a recent Washington State Appellate Court's application of the analysis in *Herbert Nelson and Other v Appleway Chevrolet Inc and others* case No. 77985-6 (April 26, 2007) as well as *Sprint Spectrum v City of Seattle* 113 Wn App. 339, 127 P.3d 755 (2006) as a potentially contrary view. In *Herbert Nelson v Appleway* the court clearly states that 'the First Amendment however will not insulate Appleway's practice of making customers bear Appleway's tax burden' which implies that passing on will be considered as a defence if the immediate taxpayer passed that burden on to the customers.

<sup>867</sup> W. Woodward (1985) 39 *U Miami LR* 873, 899.

<sup>868</sup> W. Woodward (1985) 39 *U Miami LR* 873, 911-912. See the position of the English Law Commission above that has adopted this reason. Among the four defences that can be advanced in cases of 'improperly' collected tax, the strongest is the defence of 'unjust enrichment of the plaintiff' (Law Com, No. 227 (1994) paras. 10.5-10.8.

Following collection of the illegal tax, the government has not ‘gained equity’, rather the plaintiff has lost it.

### 5.6.3. *Passing on in Antitrust (Competition) Law.*

Because of the layered market structure in which products, commodities and services are traded, which the government usually targets with taxes, the passing-on defence must also be understood in that environment. When a government imposes a tax on those products or services, regardless of whether such tax is lawful or unlawful, the corollary is that it will be reflected in the various layers of the market. That is so because the tax or any other levy always has a reflex in the price of the product or services traded. Similarly, in antitrust (competition) law, when a business-person or a corporate or a conglomerate of corporations decide to ‘fix’ a price for a particular product or service, the effect of that price-fixing will be felt on the various layers of the market, though its impact will vary from one layer to another or be dependent on other externalities such as supply and demand.<sup>869</sup>

Observing the marketplace we realise that, on the one hand, many producers do not sell directly to their ultimate consumers. The producer of a consumer good, for example, sells it to a wholesaler who in turn will sell it to a retailer who in turn will resell it to the ultimate consumer. Even if there is no wholesale stage of distribution, the ultimate consumer will ordinarily be the direct purchaser from a retailer and only an ‘indirect purchaser’ from the producer.<sup>870</sup> On the other hand, it is also true that in some cases the product in question may be used as an input into a final consumer-good, for example, flour sold to a baker who makes it into bread that is sold to the consumer. It is also

<sup>869</sup> For example, in 1975 Elmer Schaefer used the concepts of supply and demand to analyse passing on questions (see E.J. Schaefer (1975) 16 *William & Mary Law Review* 883). An evaluation and reaction to his analysis and similar studies are offered by subsequent authors such as M.W. Landes & R. Posner (1979) 46 *U Chicago LR* 602, at 619; B Sweeney (2006) *Melbourne ULR* 26; MP Schinkel & J Tuinstra, ‘Illinois Walls in Alternative Market Structures’ CeNDEF Working Papers Series 05/11/2005 (Amsterdam University), and J. Tuinstra et al, ‘Illinois Walls: How Barring Indirect Purchasers Suits facilitate Collusion’ Paper No TI 2005-049/1 at [www.tinbergen.nl/discussionpapers/05049.pdf](http://www.tinbergen.nl/discussionpapers/05049.pdf) (last accessed 19/02/2008). Ari Lehman (2005) 27 *Cardozo LR* 343.

<sup>870</sup> See generally W.M. Landes & R.A. Posner (1979) 46 *U Chicago LR* 602.



entirely possible that the product may not even appear physically in the final good, for example the oven used by the baker in making the bread. In all these the ultimate consumer is only an indirect purchaser of the flour or oven, the cost of which will be reflected in the price of the bread.

It is against this type of background that the iconic decisions of *Hanover Shoe Co v United Shoe Manufacturing Corp*<sup>871</sup> and *Illinois Bricks Co v Illinois*<sup>872</sup> were decided and must be understood in that context. These decisions are not only the pillars of the acceptance or rejection of the passing-on defence in American Antitrust law, but they also have ramifications in the private law of unjust enrichment.

In *Illinois Brick Co* the Supreme Court held that indirect purchasers do not have standing to sue for violations of the antitrust laws under section 4 of the Clayton Act,<sup>873</sup> which authorises private damages (known as treble-damages) suits by individuals or firms injured in their business or property by violation of those laws.

The *Illinois Brick* case is considered as a mirror-image of the *Hanover Shoe* case, decided almost a decade earlier. The case of *Hanover Shoe* was a suit by a shoe manufacturer against a manufacturer of shoe machinery who had earlier been found to have monopolised the shoe machinery industry in violation of section 2 of the Sherman Act.<sup>874</sup> The defendant argued that it should be allowed to show that the claiming customer had not in fact been injured by the antitrust (competition) law violation because such customer had passed on the cost of the violation to its customers, the purchasers of shoes. The Supreme Court rejected this argument, by holding that there is no 'passing on' defence to a suit by a direct purchaser. The direct purchaser is entitled to get the overcharge back [trebled], whether or not he was really injured to that extent.<sup>875</sup> The

<sup>871</sup> 392 U.S. 481 (1986).

<sup>872</sup> 431 U.S. 720 (1977).

<sup>873</sup> 15 U.S.C. § 2 (1976)

<sup>874</sup> 15 U.S.C. § 13 (1976).

<sup>875</sup> See parallelism here with the recent Canadian case *Kingstreet Investments* discussed under Canadian passing on defence, in which the court as said there held that the law of enrichment is not concerned by the possibility of the plaintiff gaining a windfall, as it is not about compensatory damages, but it is about gains acquired at plaintiff's expense where there is no juristic reason to keep them.

*Illinois Brick* case is considered a mirror-image of *Hanover Shoe* because in that case, the plaintiffs, represented by the State of Illinois suing on his own behalf and also on behalf of some 700 local governmental entities in the Chicago area, claimed overcharges in connection with various construction projects. The defendants, manufacturers and distributors of concrete blocks who were alleged to be in collusion, had sold the blocks to masonry contractors who submitted bids to general contractors who in turn submitted bids to customers such as the plaintiffs.<sup>876</sup> The *Illinois Brick*'s plaintiffs were therefore indirect purchasers of concrete blocks, and standing in the same relation to the defendants as the buyers of shoes at retail stood to United Shoe Machinery Corporation in the *Hanover Shoe* case. A similar situation occurs to customers in a passing on defence in *ultra vires* tax, considered above as the 'ultimate payers'. Therefore, the predicate of the *Illinois Bricks* suit was the passing-on of all or part of the overcharge by the direct purchaser. Without passing on, there could be no injury to indirect purchasers.<sup>877</sup>

So, in the United States, it has long been argued that unless the system is willing to countenance multiple liability, the Courts cannot allow suits by indirect purchasers without also permitting the defendant to assert a 'passing on' defence against direct purchasers' plaintiffs. In *Illinois Bricks* itself, the Supreme Court recognised that there were only two ways of avoiding unacceptable multiple liabilities: (i) allow indirect purchasers to sue but overrule the *Hanover Shoe* case, or (ii) retain the *Hanover Shoe* case and preclude indirect purchasers from suing.<sup>878</sup>

The difficulties raised by the *Illinois Brick* case, have led to various reactions to it.<sup>879</sup> Several States simply enacted the so-called '*Illinois Brick Repealers*', which in many ways may be inconsistent with each other and make it difficult for litigators with

<sup>876</sup> *Illinois Bricks v Illinois* 431 U.S. 720 (1977) at 726.

<sup>877</sup> See generally H. Hovenkamp (1990) 103 *Harvard LR* 1717.

<sup>878</sup> *Illinois Bricks v Illinois* 431 U.S. 720 (1977) at 736.

<sup>879</sup> For further reactions and detailed accounts of linked issues raised by *Illinois Brick* and the contention on the passing-on specially in antitrust law see the following literature: R. Cooter (1981) 129 *U Pennsylvania LR* 1523; SB Farmer (1999) 68 *Fordham LR* 361; E. Rollo (1992) 94 *Western Virginia LR* 1105; R. Harris & L. Sullivan (1979) 128 *U Pennsylvania LR* 269; B. Sweeney (2006) *Melbourne ULR* 26; N.R. Stoll & S. Goldfein (2006) 235 *New York Law Journal* – (17 January 2006) (online edition at [www.nylj.com](http://www.nylj.com)); W.M. Landes & R.A. Posner (1980) 128 *U Pennsylvania LR* 1274; R. Collins (1984) 26 *McGill LJ* 407; Note: 'Illinois Bricks' (1978) 39 *Ohio State LJ* 545.

plaintiffs in different States. Such a situation usually ends in multiple liability resulting in inefficiency in the administration of justice. The very possibility of multiple liability was already rejected earlier by the Supreme Court,<sup>880</sup> but mechanisms remained in place to circumvent that decision due to separation of power and State autonomy in private law matters. From the above, it can safely be said that there is not any definitive and uniform position in American law in the resolution of these matters.

#### 5.6.4. Concluding Remarks.

In sum, the denial of passing on defence, be it in antitrust (competition) law or in other private law areas, such as unjust enrichment, may allow someone who may not be injured (or only slightly injured) – the direct purchaser in case of antitrust, and the ‘direct payer’ in the general case of *ultra vires* tax demand – to recover damages or ‘acquire’ a gain, while denying the right to recover any damages to other people (indirect purchasers) in antitrust, or (‘ultimate payers’ – consumers/customers) in *ultra vires* tax demand)) who may have in fact been injured or suffered a loss. Succinctly stated, by denying the indirect purchaser the right to sue (in antitrust), and by denying the government the right to plead passing on in cases of *ultra vires* tax demands, the plaintiff (direct purchasers in antitrust, and ‘immediate taxpayers’ in *ultra vires* tax demand) receives what I have called a ‘judicial windfall’.

In the same way that the Brazilian dilemma discussed immediately below in such circumstances is decided in favour of the government which is categorised as ‘bounty-spreader’, American courts also often prefer the government to hold the ‘windfall’ in such cases because of the perceived government’s function of spending its income – legal

<sup>880</sup> *Hawaii v Standard Oil Co.* 405 U.S. 251 (1972); several States enacted the so-called *Illinois Bricks repealer* Statutes. In the wake of such State Acts, the US Congress has now enacted Class Action Fairness Act (CAFA) 28 USC § 1711 (2005) which amends 28 USC § 1332(d). In the views of many commentators, CAFA has now indirectly overruled *Illinois Brick*. See particularly NR Stoll & S Goldfein (2006) 235 *New York Law Journal* (17 January 2006). A direct, albeit implicit overrule of *Illinois Bricks* is also found now in *California v ARC America Corp.* 109 S. Ct 1661 (1989) a case in which the US Supreme Court held that state antitrust statutes may constitutionally grant damages to indirect purchasers –provided that the statutes do not deny direct purchasers their full treble damages remedy under Federal law. In essence, if the federal statute is viewed together with the state statutes, the logic is that passing-on has been established, albeit at state level only.

and illegal – for the public welfare. This benefactor’s view of the government gives it the edge over a plaintiff who will not spread his unlawful gains as broadly. This decision to prefer the government is ultimately based on policy considerations infused with some nuanced principles in the broader legal system.

### 5.7. Passing on In Brazilian Law.

The recovery of taxes demanded ‘ultra vires’ or through any other impropriety in the demand for payment by a public authority will ordinarily fall within the purview of the provisions on undue payments, including the more recent provisions on the general principle of enrichment *sine causa*. Where the facts of the case so justify, the provisions on *negotiorum gestio* would also be applicable.<sup>881</sup> However, given that Brazilian law has a well structured codified system, and taxation is seen as a matter of public law, the legislature has clearly avoided some possible ambiguities arising from cross referencing between the general law provided for in the Civil Code and the special laws on taxation. Thus, the recovery of ‘improperly demanded’ taxes or any other payments demanded by the Revenue Services are specifically provided for in the *Código Tributário Nacional*<sup>882</sup> (Brazilian National Taxation and Revenue Code of 1966).<sup>883</sup> Thus, art.165<sup>884</sup> of Lei 5.172 of 1966, as amended by the aforesaid law, provides as follows:

<sup>881</sup> See discussion of this in chapter 4 above.

<sup>882</sup> The description ‘Código Tributário Nacional’ (National Taxation Code) instead of ‘Código Tributário Brasileiro’ (Brazilian Taxation Code ) was adopted by art. 7 of the Complementary Act 36 of 13 March 1967.

<sup>883</sup> Lei (Law nº 5. 172, of 25 de October 1966, as now amended by the Complementary Law No. 118 of 9 February 2005).

<sup>884</sup> The original text in Portuguese reads as follows: SECÇÃO III – Pagamento Indevido:

Article. 165. O sujeito passivo tem direito, independentemente de prévio protesto, à restituição total ou parcial do tributo, seja qual for a modalidade do seu pagamento, ressalvado o disposto no § 4º do artigo 162, nos seguintes casos:

I - cobrança ou pagamento espontâneo de tributo indevido ou maior que o devido em face da legislação tributária aplicável, ou da natureza ou circunstâncias materiais do fato gerador efetivamente ocorrido;

II - erro na edificação do sujeito passivo, na determinação da alíquota aplicável, no cálculo do montante do débito ou na elaboração ou conferência de qualquer documento relativo ao pagamento;

III - reforma, anulação, revogação ou rescisão de decisão condenatória.

Art. 165 – Save the disposition of paragraph 4 of Art. 162, the passive subject<sup>885</sup> has the right to total or partial restitution of a tax in the following cases, regardless of any previous protestation and whatever might have been the modality of its payment:

- (i) – the spontaneous charging or the payment of an undue tax or a levy which is higher (greater) than that which is due in the face of the applicable tax legislation or of the nature or material circumstances of the fact that effectively gave rise to what happened;
- (ii) – a mistake in the establishment ‘(edification)’ of the passive subject, in the determination of the applicable ‘flat tax’ [*alíquota*], in the calculation of the amount of the debit, or in the conferral of any document regarding the payment;
- (iii) – reform, annulations, revocation or rescission of a ‘condemnatory’ (penal) decision.

The exception provided for under paragraph 4 of art. 162 above reads as follows:

[T]he loss or destruction of the ‘revenue stamp’ [*estampilha*], or a mistake in the payment in this modality, shall not give right to restitution, save in the cases expressly envisaged in the tax legislation, or in cases in which the error is attributable to the administrative authority’.

Article 166 of the *National Tax Law* provides further that

‘[R]estitution of taxes that, by their nature, entail transfer of the said financial burden shall only be effected to someone that proves to have undertaken the said burden, or, in the case he has transferred it to a third party, the transferee must expressly have authorised him to receive it.’<sup>886</sup>

The reading of the above provisions certainly indicates that a Public Authority (be it the Union itself – the Brazilian Federation - or any State or other public body, described as ‘active subjects’ under art. 119 of the *Código Tributário Nacional*), cannot enrich themselves by improperly collected taxes, without at the same time infringing upon the principles of legality and probity enshrined in the law. However, the law as set out does not objectively mention the situation of a taxation norm that has been declared unconstitutional by the Federal Supreme Court (STF). Thus one is required to make some inferences from the provisions themselves and interpret the text in a consistent manner that will maintain a logical harmony in the normative system. In this context, reading the

<sup>885</sup> ‘Active subject’ and ‘Passive subject’ are defined in the law itself respectively in art. 119-120 and 121-123. According to art. 119 ‘active subject of the obligation’ is ‘the juridical person of public law, (public authority) entrusted with the competency to demand its implementation’; and the ‘passive subject of the obligation’, according to art. 121 is defined as ‘the person obliged to pay the tax (or levy) or a pecuniary penalty’.

<sup>886</sup> The Original Portuguese text reads as follows: ‘Art. 166. A restituição de tributos que comportem, por sua natureza, transferência do respectivo encargo financeiro somente será feita a quem prove haver assumido o referido encargo, ou, no caso de tê-lo transferido a terceiro, estar por este expressamente autorizado a recebê-la’.

provision of art. 168(2) which establishes a right to restitution of a payment effected due to a 'unlawful decision' which has since been reformed, annulled, revoked or rescinded, would seem to establish that the restitution of an *ultra vires* tax is of right and cannot ordinarily be denied. However, one must still remember that under the Brazilian law of enrichment there is the requirement that the plaintiff must have suffered a loss in order to recover in unjust enrichment and recovery is capped with the amount lost.<sup>887</sup> Hence, in an Appellate Taxation decision reported at 14.810/02/2 (the parties are described as *Usina Açucareira Passos S/A v Evandro De Sousa/ Outros*<sup>888</sup>) the court was faced with the fact that the applicant had effected payments of an AIR (*Additional do Imposto de Renda* = Additional Income Tax) in the period between April 1990 and April 1993, in accordance with a State Legislation,<sup>889</sup> which the Brazilian Federal Supreme Court found unconstitutional in November 1993.<sup>890</sup> At issue in the litigation was a claim for the undue payment (*repetição do indébito*) of the AIR made between April 1990 and April 1993. The claimant argued that the Federal Supreme Court decision No. 619/93 mentioned above was effective for all Minas Gerais taxpayers, and alleged that in the case in question the provisions of art. 166 of the National Tax Code were not applicable, as it had been found by the State's Supreme Court of Justice (the STJ)<sup>891</sup> because it was an indirect tax, therefore null and void. Because prescription was a hurdle, depending on how the claim was framed, the claimant argued that a prescription period of ten years, calculated from the date of the collection of the undue payment, applied to the facts. It is to be noted that the claimant presented its restitutionary claim (AIR) to the Minas Gerais Taxation Authority at Passos (Administração Fazendária de Passos) on 13/07/2000, more than seven years later, while under art. 168 of CTN the prescription period is five years calculated from the date of the extinction of the tax credit (i.e., 'payment').

Notwithstanding the court having found that the claimant was not entitled to restitution of the claimed tax payment due to prescription according to art. 166 of the CTN and the

<sup>887</sup> See Chapter 4 above.

<sup>888</sup> Acórdão: 14.810/02/ (Segunda Turma); Impugnação No. 40.010101540-43 (Inscrição Estadual: 479.089074.0018 AF/Passos State of Minas Gerais).

<sup>889</sup> Law 9.751/88 of the State of Minas Gerais.

<sup>890</sup> Decision ADIn No. 619/93 (Supremo Tribunal Federal – STF).

<sup>891</sup> **Note for non-Brazilians:** Brazil is a Federation of States. Each State has its own Supreme Court of Justice (the STJ) which is different from the 'Supremo Tribunal Federal' (the STF).

Revenue Services having solely and exclusively framed their defence based on prescription, given the facts of the case, the court *mero motu* thought it necessary to analyse in broader sense the implications of the issues, because, as stated earlier, the provisions did not directly mention the effect of a Supreme Court finding a tax legislation to be unconstitutional. Because art. 166 of the CTN provided that '[r]estitution of taxes that, by their nature, entail transfer of the said financial burden shall only be effected to someone that proves to have undertaken the said burden, or, in the case he has transferred it to a third party, the transferee must expressly have authorised him to receive it',<sup>892</sup> this raised the need to establish who had actually borne the burden of the said tax. In a rare occasion a civil law court citing both an academic and 'precedents' to back-up its reasoning, the court referred to Professor Aliomar Andrade Boleeiro<sup>893</sup> positions on the theme as well as two court decisions to support its conclusion, perhaps for being aware that it was departing from clear provisions in the Civil and Taxation Codes. Thus the court<sup>894</sup> verbatim said (my translation):

On the theme, Professor Aliomar Boleeiro, cited by many other authors, says that the repercussion is conditioned by different variables, of which the most important are related to the tenets of offer and demand and to the conjectural economic circumstances so that as regards the same 'tax', the passing-on of the burden may or may not happen, because it is a changing phenomenon in which the '*de iure* taxpayer' ('contribuinte de direito') transfers the burden to the '*de facto* taxpayer' ('contribuinte de facto') who will ultimately support the burden of the tax'.

Should the enterprise be industrial or commercial, the taxpayer (the *de jure* taxpayer), in the process of formulating its pricing policy will take into consideration the costs of the goods and the charges of the 'contributors' (the *de facto* taxpayers' charges) that will be re-passed to the State's coffers. In this manner, when it establishes the profit margins of its mix of products, the trader will 'include' in its

<sup>892</sup> The Original Portuguese text reads as follows: 'Art. 166. A restituição de tributos que comportem, por sua natureza, transferência do respectivo encargo financeiro somente será feita a quem prove haver assumido o referido encargo, ou, no caso de tê-lo transferido a terceiro, estar por este expressamente autorizado a recebê-la'.

<sup>893</sup> Aliomar de Andrade Boleeiro was a Tax Law Professor who later became a member of the Brazilian Parliament and finally a Judge of the Brazilian Federal Supreme Court (STF) and its Chief Justice (Presidente do Supremo Tribunal) in 1971/1973. But in the judgment below he is cited more as an academic than as a judge, renowned books *Direito Tributário Brasileiro*. 10<sup>th</sup> ed.; Forense (1996) and *Limitações Constitucionais ao Direito de Tributar* 2<sup>nd</sup> ed. (1960), than as judge.

<sup>894</sup> Decided by a majority decision with one member (Luiz Castro Trópia) dissenting. For the majority were the following judges ('Conselheiros'): Roberto Nogueira Lima (Relator), Lúcia Maria Bizzotto Randazzo, Luciana Mundin M Paixão, President & Revisor).

costs all expenses including those that will be borne in the future, because if it does not do so, it will leave Revenue Services [described as ‘o Caixa’] without financial support to fulfill its commercial, fiscal and social obligations. In this manner, and in the final analysis, it is the consumer who supports the entire burden (charges), and as such it is the *de facto* taxpayer. So, for a trader to put forward a restitution claim of that which he unduly paid, it will not suffice for him to prove only the ‘unlawful enrichment of the Revenue Services (o Fisco), but also that that fact impoverished him, or that he was expressly authorised to do so by the *de facto* taxpayer to whom he passed-on the burden.

*In* this instance, it was not proved that the commercial practice of the applicant had exonerated its client from the tax burden, even if it could pay after the expiry of the accounting period.

In this case it was not proved that the applicant had taken over the onus to pay AIR (Additional Tax Income), and the decision of the Chief Fiscal Administrative Officer of Passos (Minas Gerais) is upheld. In a similar factual scenario, the TJSP (Tribunal de Justiça de São Paulo) RT 638/102, TJSP held: ‘Denying the (passing on) but not proving it with his accounting and taxation books, the taxpayer establishes a positive premise – that his patrimony was affected by the tax burden – the onus is upon him to prove the constitutive fact of his right (art. 333 of CPC, C/C o art. 166 of CTN<sup>895</sup>). If he abstains from proving it, he has not made out his restitutionary action’.

If any doubt subsists as to where AIR fits regarding its classification and financial support of ‘tax’ [do tributo] by the consumer-taxpayer it is worth transcribing the vote (decision) of the Eminent ‘Desembargador’ (Judge of Appeal) Rubens Xavier Ferreira in the Appeal No. 44.233/5, of TJMG (Tribunal de Justiça de Minas Gerais):

Faced with a dilemma between enriching *sine causa* the Revenue Services (Treasury) by denying restitution of a tax which was unduly charged, and enriching the taxpayer *sine causa*, who did not suffer any decrease in his patrimony because of the illegitimate taxation, it is always preferable to opt for the enrichment of the Treasury, given that the business of the State has as its finality the satisfaction of the interest of the collectivity and constitutes, on balance, the lesser evil. It would be doing a lesser justice awarding him (the plaintiff) a super-profit *sine causa* for his own personal benefit rather than leave such value with the State, which presumably has already utilised it in the maintenance of public services and in the satisfaction of various other burdens that fall on the Treasury for the benefit of the collectivity.

<sup>895</sup> Article 333 of the *Código Processual Civil* [Civil Procedure Code] read with Art. 166 of the *Código Tributário Nacional* (CTN).



If the dilemma is to sanction the enrichment *sine causa*, either in favour of the State, by rejecting that a claim in such a case is made out or simply disallowing it, or in favour of the taxpayer, if the petition is allowed, there must be no hesitation that the first alternative is the one that must prevail, because the State represents, by definition, the collective interest, for the protection of which the sum of the Revenue is destined, a sum that a private individual now claims for his own personal benefit.

The extract above clearly indicates the foundation and ‘logical consistency’ of the Brazilian enrichment law, that it requires a mirror-image loss-gain and as such it will not ordinarily uphold a claim for plaintiffs who suffered no loss. A passing on defence by the Public Authority is what is at work in this case.<sup>896</sup> However, it is less convincing that such an approach fully upholds the rule of law as claimed in the same judgment. Be it as it may, resource and time constraints limit me to further investigate how widespread is the position above and to what extent the passing-on defence is fully entrenched in the Brazilian legal system and what ramification it has.

### 5.8. *Passing on In South African Law.*

The defence of passing on as such is unknown in South African law.<sup>897</sup> However, the principles upon which it has been advanced in other jurisdictions are not strange to the South African legal system. As we have seen above, the concept of passing on mainly arises in the tax context and to some extent in antitrust (competition) law. The ideals governing these bodies of law are similar to some extent to those of other jurisdictions, such as the rule of law or the principle of legality enshrined in the South African

<sup>896</sup> In the Brazilian case above one can also see the notion sometimes prevalent in some American judgments that hold the idea of the ‘government as a bounty-spreader’. This idea reinforces the approach that the plaintiff may not recover on a ‘*quid-pro-quo*’ argument which holds that ‘the illegal revenues are (or were) actually returned to the claimant in the form of other benefits, and, therefore, the claimant has no reason to complain. See for example *Universal Film Exchange v Board of Finance and Revenue* 185 A. 2d 542 (1962) at 548.

<sup>897</sup> In his recent book on the law of *Unjustified Enrichment* (2008) Professor D. P. Visser deals briefly with such notion of passing on, and questions whether South African law should consider recognizing such a defence (pp. 748-752). After a brief overview of other legal systems that seemed to him had such a defence, and considering the arguments in favour and against the defence, Visser came to the conclusion that South Africa should not venture into this area, even if on principle he could have sanctioned it, as the intricacies (or near impossibilities) of proving such defence seemed to him insurmountable.

Constitution (ss 1-2); the right to security of one's property (s 25);<sup>898</sup> the rule of law that entrenches the Constitution as the supreme law of the land; the rule that a right enshrined in the Bill of Rights can only be overridden by a law of general application (s 35); the duty entrusted to the courts to develop the common-law in line with Constitutional principles, just to cite a few examples. In general an improperly demanded tax, either due to some sort of 'indirect pressure' exerted upon the taxpayer constrained to pay the tax due to some business or personal vicissitudes, or simply a tax that has been found not to be owing due to the illegality of the instrument upon which it was exacted, will simply fall under the general idea of 'undue payment', and in principle the *condictiones* are able to deal with such a matter, as payments made under void or non-existent agreements, therefore, *sine causa*.

However, due to the specificity of the context in which they arise, it is not strange that the applicability of the common-law is often directly or indirectly ousted by Statutes. It is to be expected then that various statutes dealing with tax issues will provide a provision for the recovery of the money paid as tax which is not owed; and this very tendency situates the majority of the cases in statutory law context and ultimately it may be an issue of public law. For this reason, in practice, the number of claims to recover money paid as a tax which is not due where any principle of private-law would need to be relied upon is likely to be small. So too will be the number of cases in which claimants will be allowed to rely on their private-law right in preference to those conferred by Statute, for example, because they wish to take advantage of a more flexible system of rights in preference to those conferred by statute—such as prescription period<sup>899</sup> or right to interest. Nonetheless, cases arise where 'common law' principles are in play. I will deal with some of these cases briefly. For example, similar issues mentioned above in the English *Woolwich* case arose in *Eskom v Thabo Mofutsanyana Districtsraad*<sup>900</sup> where *Eskom* claimed back R 130 000 paid in terms of a services levy imposed by the *Thabo*

<sup>898</sup> S 25(1) reads 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.

<sup>899</sup> See for example the approach adopted by the appellant *Eskom v Bojanala Platinum District Municipality* (2005) 4 SA 31 (SCA).

<sup>900</sup> *Eskom v Thabo Mofutsanyana Districtsraad* (case no. 4184/2001) – (18 Mar 2004) – unreported case, but noted by D. P. Visser in *South Africa Annual Survey* (2004) 280 and also noted in (2005) 13 *RLR* 205.

*Mofutsanyana Districksraad* (District Council). Similarly to the *Woolwich* factual scenario discussed under English law, *Eskom* also had doubted its liability to pay the levy and sought legal advice from two Senior Advocates, who unfortunately gave conflicting opinions. At first *Eskom* refused to pay and the dispute ended up in Court. While the case was in progress it decided to pay the amount of the levy because it would be ‘politically incorrect to antagonise the local authority and also to avoid penalties if the payment turned out to be due’. After most of the amount had been paid to the District Council, the court ruled that the levy was indeed not due. *Eskom* meanwhile still paid R16 000 of the total amount after the judgment had been given, but then decided to reclaim the full amount, which resulted in the present case. The case is fully commented by Daniel Visser in (2005) 13 *RLR* 206 and need not be repeated here, save to acknowledge that, contrary to the court’s interpretation, it indeed makes sense that exacting a tax which is not owed does squarely fall within the meaning of property in section 25(1) of the South African Constitution, for as Visser argues, it would make no sense that the same provision allowed one’s house not to be expropriated by the State without compensation, but allowed one’s bank account to be cleared out by the authorities. There must therefore be uniformity on how the provisions of legislations are interpreted. For our purpose, however, the further issue that the case raises is indeed the ‘voluntariness of the payment’ and to what extent the law can allow ‘indirect coercions’ such as ‘fear of penalties’ and ‘politically incorrectness’ as sufficient ‘coercion’ to cancel out one’s free will. In my view, in the absence of other policy considerations such coercions should not be entertained as sufficient enough to cancel the ‘voluntariness’ aspect of the payment. The case is of further importance because it brings out the issue as to what extent it can be said that South African law recognises a recoverability of *ultra vires* demanded taxes as of right. Is the right to recover a *prima facie* right only or is it a mandatory right? Discussing English law above, we have seen how the three possible approaches that could be followed to recover such payments, and one of which, like in South African law<sup>901</sup> relied upon mistake. But ultimately, due to the constitutionality of the issue and the sphere upon which the matter arises, it was found that the best arena to deal with *ultra vires* demanded tax is the public law. So, based on the provision of section 32 of the

<sup>901</sup> See for example *Bowman, De Wet and Du Plessis NNO v Fidelity Bank Ltd* (1997) 2 SA 35 (A).

South African Constitution it could indeed be ideal that the guarantee of the just administrative action provided for in that section could allow the recoverability of the levy which is imposed when it is not sanctioned by law and such violation of the law can best be remedied by allowing the citizen to recover as of right without any reference to error.

We have also seen discussing Canadian law, that the reasoning in the recent *Kinsgstreet Investments* case led the court to depart from the proposition that ‘the law of enrichment is not designed to confer windfalls to plaintiffs who suffered no loss’ to the new proposition that the law of enrichment ‘is not concerned by the possibility of the plaintiff obtaining a windfall because it is not founded on the concept of compensation for loss’. Taking into account that South African law is one of the legal systems that supports the mirror image gain-loss, despite its recognizing the defence of loss of enrichment and geared towards the acceptance of a general principle, it can still be asked whether the insistence upon gain-loss does not place South African law in a better position to recognizing the defence of passing on, for that recognition would indeed bring some symmetry in the law. So far, however, no direct case has dealt with passing on in South Africa, and therefore, the terrain is still open to explore.

### 5.9. *Interface Change-of-Position and Passing-on Defences.*

Change of position being a general defence to enrichment claims,<sup>902</sup> will inevitably have some crossing-points with other defences that the law of enrichment recognises. In one sense all other defences operate as if in ‘special’ or ‘specific conditions’, while change-of-position would analogously operate in the ‘general condition’; i.e.; it encompasses all sorts of enrichment claims, irrespective of the ‘*condictione* (or its equivalent in modern Codes) that raises them (or of the ‘unjust factor’ that is alleged to disapprove retention of

<sup>902</sup> See chapter 3 above for details on this assertion.

the benefit by the defendant), being only excluded if a specific defence is available. Some defences will operate more in similar situations where change of position operates excluding some of its elements or requirements, while others will operate in very different and ‘specific’ circumstances. Under this ‘analysis’ passing on seems to operate in ‘specific situations’ as all other defences, save change-of-position. In one sense it can be said that passing on is a ‘positive (or ‘affirmative’) defence’, and in another sense it also encompasses aspects of a ‘negative defence’. Analytically, passing on fulfills all the conditions of a ‘positive defence’, in that the defendant recognises that he has been enriched, ‘at the plaintiff’s expense’ (understood as initial expense), and that in ordinary circumstances the plaintiff would be entitled to recover the enrichment; but thereafter the defendant pleads that under the particular circumstances of the case it would be ‘inequitable’ to grant the relief sought by the plaintiff on account of such relief infringing the very same principle the plaintiff invokes for his own recovery; that is to say, ‘no one should enrich himself at another’s expense without ‘plausible justification’’.<sup>903</sup> Therefore, ‘the equities being equal’ (in the sense that neither the plaintiff nor the defendant can succeed without infringing the very same principle), then the alleged loss, if any indeed exists, should lie where it currently falls. We have seen above that the defendant infringed such a principle by demanding the said tax-money ‘unlawfully’ (*ultra vires*) in contradiction with a general principle of law. Now the plaintiff in turn would be defeating the very same principle by asking the defendant to refund to him what in reality belongs to the customers from whom it was exacted by the plaintiff shifting his financial burden to them. The real impoverished party to such a claim is the customer. But ‘passing on’ is also a negative defence because it actually denies one of the enrichment claim’s essential elements – the aspect ‘at the expense of’. It is so because a claim in unjustified enrichment is only made out if the plaintiff can establish that the defendant has actually enriched himself at the claimant’s expense. If he cannot ultimately

<sup>903</sup> I use the expression ‘plausible justification’ here to encompass both the positive and negative approaches to unjust or unjustified enrichment, for whether one speaks of ‘absence of a cause’ as a reason for plaintiff’s recovery or the presence of an ‘unjust factor’ depriving the defendant the right to retain the claimed enrichment, one is ultimately offering a ‘plausible justification’ for what it is being asked for. However, I do not mean that the ‘absence of cause’ or the ‘unjust factor’ requirements should be replaced by such expression. It only has a descriptive function in the context of the issue I am dealing with.

prove such a requirement, then it can indeed be said that he hasn't actually made out his claim.

All these arguments apply smoothly in the event that the defendant alleges and proves that the claimant has fully recouped its losses, i.e.; the 'amount' shifted onto the customers corresponds exactly with the amount 'transferred' to the defendant. If the claimant alleges that it has not entirely recouped its losses and the defendant cannot disprove that allegation, then, another limb of the defence can develop: how to assess the measure of the 'claimant's loss', and consequently the value of the defendant's enrichment that corresponds to such a loss? One must be aware here that the law of enrichment in various jurisdictions is not about 'losses' but it is about the defendant's 'gains' acquired at plaintiff's expense. In many jurisdictions (unlike South Africa), there need not be a mirror-image 'loss-gain', save those jurisdictions that so require to make out an enrichment claim. In any event, the issues raised in such contexts and the reasoning advanced still have force in that in the operation of business the claimant may have increased the price of his products or services as part of his operating costs and not necessarily that all the amount that the defendant alleges that has been passed on to the customers is indeed what the claimant 'recouped as his losses'. Though the assessment of the values in these scenarios becomes very complex and apparently impractical for the administration of justice, the issue may indeed raise the conundrum analogous to the one that historically has been raised between restoration where a non-fungible is at issue and the one where it is the fungible. That is so because although what was paid is money and money is a fungible and can be replaced by its equivalent value, that is only feasible when the amount has been ascertained or is readily ascertainable. If it is not, a complex exercise must be undertaken, and in this exercise one would have to inquire into the economics<sup>904</sup> of certain products and services, the nature of the 'commodities',

<sup>904</sup> Here one would need to know whether the product/service in question is traded in a monopoly, oligarchy, or a competitive market. The impact of the tax incidence in each of the three situations just mentioned will differ. See for example *In Re Brand Name Prescription Drugs Antitrust Litigation* 123 F. 3d 599 (7<sup>th</sup> Cir. 1997). This is an antitrust case in which manufacturers and wholesalers had conspired with one another to deny retailers discounts available to favoured customers. The facts illustrate what is known in American legal literature as the 'exceptions to the *Illinois Brick*' rule, i.e., cases in which passing on is permitted as a defence, because of the monopolistic position of one party, as well as the resulting problem

‘products’<sup>905</sup> or ‘services’ taxed; the nature of the market<sup>906</sup> in which those commodities, products or services are traded and the impact of specific taxation in that market on the acquisitive power of consumers and the respective loss of market shares to the claimant,<sup>907</sup> which ultimately might impact on the claimant’s gains.<sup>908</sup> In this case, we are really no longer in the realm of a specific thing or an ascertained or ascertainable value of that which has been ‘lost to the defendant’ (i.e.; gained by the defendant), but we enter the realm of an un-ascertained value. Because the ‘real value’ which the claimant alleges he has gained in these circumstances and he objectively ‘paid’ it to the defendant is a matter of interpretation, there is also the possibility of an interface with some elements of ‘loss of enrichment’ or ‘change-of-position’ defence. That is so because with

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of successive monopolies, which creates a second layer of market power that in turn results in the possibility of differing prices at each layer.

<sup>905</sup> For example, when particular commodities being traded from a wholesaler to a retailer are inputs for intermediaries and/or final consumer goods, that can span a wide array of differentiated products; many parties in the economy are likely to be injured, each typically to a different extent. Some intermediaries may be able to pass-on all of an input price increase imposed on them, while others have to absorb the injury. Therefore the extent of the passing-on is determined by the nature of competition and the demand elasticity in the various markets in which the products or services that are the subject of the ‘inappropriate’, ‘*ultra vires*’ or ‘unlawful’ taxes are traded. Typically, in these circumstances, the more competitive a layer of the production-distribution chain of that product or service is, the larger is the part of the input price increase that is passed-on by the firms in that layer. (See in this regard a detailed study undertaken by EU on ‘Damages Actions for Breach of EC Antitrust Rules’, (SEC 2005) 1732 & COM (2005) 672 Final, Brussels (19 December 2005). The results of the Green Paper are thoroughly discussed by Jakob Rüggeberg and Maarten Pieter Schinkel of the Universiteit van Amsterdam, Amsterdam Center for Law and Economics (Amsterdam 21 April 2006). Electronic version available at Tinbergen Institute [www.tinbergen.nl/discussionpapers/05049.pdf](http://www.tinbergen.nl/discussionpapers/05049.pdf) (accessed 19/02/2008).

<sup>906</sup> The incidence of taxation in a ‘perfectly competitive market’ will differ from that in an ‘imperfectly competitive market’. Using, for example, the ‘general static-equilibrium model’ (the models are described below) some economists have found that where there is a ‘perfectly competitive market’ the trend is for the producers to absorb the taxes through ‘backward shifting’ (such as replacing ‘human labor’ by machines, reducing workers’ income, etc, or simply put, the burden of taxes tends to fall on factors that are relatively immobile), but where there is an ‘imperfectly competitive market’, the trend is ‘forward shifting’, i.e.; the taxes are mostly passed on to consumers in higher prices (see M.L. Katz and H. S. Rosen ‘Tax Analysis in Oligopoly Model’ (1985) 13 *Public Finances Quarterly* 3-19). In this case if there is a ‘backward shifting’, the claimant might have recouped some of his losses through savings, for example on labour, as he might have paid less income to workers, or retrenched some, saving costs, by opting for capital intensive business (machines, instead of labour), but he may also have incurred losses affecting the output of the business.

<sup>907</sup> The basic issue here is that taxation induces changes in individuals and businesses’ behaviour. The associated changes in commodity prices and factor returns ordinarily imply that the final burden or ‘economic incidence’ of a tax will be different from its ‘statutory incidence’, that is to say, a tax may be partially or fully ‘shifted’ from one set of economic agents to another. In economic circles business taxes, for example, are a frequently cited example, as they may be either ‘shifted forward’ as higher consumer prices, or ‘shifted backward’ as lower wages or land, smaller buildings, etc.

<sup>908</sup> Further below I offer some simplified economic implications of this issues.

the 'defence of change of position the defendant is no longer required to make restitution when his assets are no longer swollen by the benefit received'.<sup>909</sup>

When the claimant objects that he did not fully pass on the cost of the inappropriate tax through price increase, but alleges that its business was affected either through the costs, say, of inputs, or that the level of its output had to be adjusted due to the impact of the price increase in the market or other factors, then, the practical issue becomes that of estimating or calculating the elasticities<sup>910</sup> of supply and demand of that product or service in the market. Today's advanced econometrics in conjunction with related disciplines can certainly estimate with near mathematical precision the results, though all of it may depend, inter alia, on the strength of the economic assumptions made and the availability of data or its collection in the relevant market or industry. However, despite the help of advanced and sophisticated econometrics modelling, economists still disagree on the route to follow in calculating such elasticities. They seem to agree only on the difficulties of the task. They usually estimate the different values of elasticities in relation to the supply and demand, the price and other variables to determine what exactly was passed-on and what was not, and if anything was passed-on at what stage, how and why. Hence, if a legal system ventures in accepting the passing-on defence, but in a given case the extent of such passing on is disputed, it is almost certain that the success of the defence will require gathering such complex evidence and the litigants must face the inherent difficulties in the process. Among the various difficulties that are likely to be encountered, the following merit some attention and description: (i) Although it is

<sup>909</sup> M. Rush, *The Defence of Passing on* (2006) 180.

<sup>910</sup> *Elasticity* is understood as the measure of the responsiveness of one variable to changes in another. Economists have identified four main types of elasticity: price elasticity, income elasticity, cross-elasticity and elasticity of substitution. Price elasticity measures how much the quantity of supply of a good, or demand for it, changes if its price changes. If the percentage change in quantity is more than the percentage change in price, the good is said to be price elastic; if it is less, the good is said to be price inelastic. Income elasticity of demand measures how the quantity demanded changes when income increases. Cross-elasticity shows how the demand for one good (for example, coffee) changes when the price of another good (for example, tea) changes. If the said goods can substitute each other (such as coffee and tea) the cross-elasticity will be positive: an increase in the price of tea will increase demand for coffee. If the said goods are complementary (example, tea and teapots) the cross elasticity will be negative. If the said goods are unrelated (for example tea and oil) the cross-elasticity will be zero. Elasticity of substitution describes how easily one input in the production process, such as labour, can be substituted for another, such as machinery. (for explanation of these and other terms, see amongst others, *The Economist*, whose electronic version on the issue is made available at

<http://www.economist.com/research/Economics/alphabetic.cfm?terms/> (last retrieved 15 June 2008)



possible to estimate with fair degree of precision either the demand or supply elasticity for a certain product or service, it is exceedingly difficult to estimate both simultaneously, say the economists.<sup>911</sup> That is so because demand estimation is normally facilitated when such demand is relatively constant, but supply is shifting (increasing or decreasing), so that the interaction between the different supply patterns and the constant demand pattern enables the value of the demand to be established precisely.<sup>912</sup> However, given that in this instance the supply is also shifting, the estimation of the precise pattern, and consequently the precise value of the amount passed-on becomes difficult. Conversely, where supply is constant, but demand is shifting, the estimation of the supply pattern is facilitated because the intersections between the supply pattern and the different demand patterns enable the values along the supply curve to be determined precisely. But, again, the estimation of the demand in turn becomes difficult. Consequently, because of these difficulties, economists are generally agreed that in these circumstances, trying to identify both supply and demand patterns is often a statistical nightmare<sup>913</sup> and the outcome may be an unwarranted result. (ii) There will be a time lag between the moment the inappropriate tax is imposed and the time it is discovered and the claim instituted. Because of such lag of time, it is almost certain that there will be variations and fluctuations at certain periods in the demand and supply patterns and therefore the

<sup>911</sup> W.M. Landes & R.A. Posner (1979) 46 *U Chicago LR* 602, 618-619.

<sup>912</sup> Ibid.

<sup>913</sup> According to G. R. Zodrow, 'Tax Incidence' in *Encyclopedia of Taxation and Tax Policy*, 1<sup>st</sup> Ed. (1999) 200-202, financial economists have constantly used in the past decades three basic approaches to analyzing tax incidence, namely 'partial equilibrium analysis', 'static general-equilibrium analysis' and 'dynamic general equilibrium analysis'. The first and the most widely used analyses the effects of taxes in a theoretical model of the economy, but it markedly differs with the other two approaches in various aspects, such as the number of markets analysed, the extent to which the factor supplies are assumed to be fixed, the method of capital accumulation, and the extent to which transitional issues are addressed. The second approach is still a bit closely related to the first because it involves numerical simulations of tax effects in models that are basically complex variants of the analytical models. The third approach calculates incidence by estimating individual tax burdens directly using large micro-data sets. Analyzing in further detail the 'partial-equilibrium analytical model', for example, and applying it to a single market (in this case the assumption was to ignore any tax induced effects in other markets) the writer observes that the results demonstrate that 'incidence is determined primarily by the extent to which individuals or firms are able to change their behavior to avoid the tax. This flexibility is typically measured by price elasticities of demand and supply'. By way of example he illustrates that 'the burden of an excise tax tends to be borne by consumers if demand is relatively inelastic - that is, if consumers are unable to substitute away from consumption of the taxed good; by comparison, the burden of an excise tax tends to be borne by producers if supply is fairly inelastic'. In limited cases, 'the tax is borne fully by a single group; for example when the demand is perfectly inelastic or supply is perfectly elastic (as is the case with constant return to scale in production [i.e. mass production], consumers bear the entire burden of the excise tax.' The article is also available online at <http://urban.org/uploadedPDF/1000534.pdf> (Last accessed 11 July 2008).

elasticity values of these variables will also yield different passing on values depending on the extent of those changes, because elasticity may depend on the amount of time buyers and sellers have in which to adjust to the price change. (iii) When there is only one class of product or service traded, only two elasticity estimates are required. Thus, statistical problems multiply as the class of products or services lengthens.

Despite these real and apparently insurmountable difficulties, the calculation of the extent of passing on is not necessarily murkier in all aspects and the difficulties should not be overstated. Many sectors of the economy already use what is known as 'percentage mark-up pricing'.<sup>914</sup> In cases arising from transactions involving this form of pricing, proof of passing on involves simply the computation of the elevation in prices caused by one level's application of the percentage mark-up to increase costs stemming from the previous level of overcharge.<sup>915</sup> Furthermore, in the same way that in some complex cases the apportionment of damages is accomplished, the same can also be achieved in the case of passing on defence in unjustified enrichment. For example, in some American antitrust cases this has been achieved.<sup>916</sup> Where for instance the only claimants suing are businesses, courts there have used the so called 'yardstick' technique to determining damages suffered. This technique compares the plaintiff's allegedly reduced profit level with those of unaffected but otherwise comparable firms in the same industry.<sup>917</sup> There is equally another alternative technique that has been applied in cases of passing on

<sup>914</sup> Mark-up pricing is one of the several different policies companies use to price their products. They do it by calculating the cost per unit of output, to which they add a profit margin, or a 'price mark-up' to determine the final price of their product. The cost per unit is the variable 'production' and marketing cost per unit of output plus the average overhead cost. Then, the final price is determined by adding a certain percentage margin to the unit cost. (See generally R. E. McAuliffe, *The Blackwell Encyclopaedia Dictionary of Managerial Economics*, 2<sup>nd</sup> Ed. (2006) 125. See also J. Federkea et al, in South Africa at [http://www.commerce.uct.ac.za/Economics/staff/jfederkea/Documents/2006/markup14jae2\\_v3.pdf](http://www.commerce.uct.ac.za/Economics/staff/jfederkea/Documents/2006/markup14jae2_v3.pdf).

The price mark-up is usually expressed as the difference between the final price and the marginal cost of production, as a percentage of either the price or the marginal cost. In this situation, the marginal cost represents the per unit cost of production. The former method gives the 'mark-up' on price, while the latter gives the mark-up on costs. Thus, for example, if P represents the final price of the product, and MC its marginal cost, then the 'mark-up' on price equals  $\frac{P-MC}{P}$  and the 'mark-up' on cost is  $\frac{P-MC}{MC}$ .

<sup>915</sup> D. Berger & R. Bernstein (1977) 86 *Yale LJ* 809, 862 note 238.

<sup>916</sup> See for example *Lehrman v Gulf Oil Corp.* 500 F.2d 659, 667 (5<sup>th</sup> Cir. 1974), *cert. denied* 420 U.S. 925 (1975); *Pacific Coast Agr. Export v Association v Sunkist Growers, Inc.* 526 F.2d 1196, 1206-07 (9<sup>th</sup> Cir. 1975), *cert. denied* 425 U.S. 959 (1976).

<sup>917</sup> See for example *Richfield Oil Corp. v Karseal Corp.*, see 361 US 901(1960). In this case for example, the court carried out the determination of volume reduction due to price increase as it was necessary to compute the intermediate purchaser's profit losses.

defence, where essentially all businesses in the industry have been affected. It compares the ‘pré-violation’ and ‘post violation’ profit levels for each level of business purchasers. Both of these techniques reveal how much of an alleged overcharge is absorbed at each intermediate level in the chain of distribution, thereby preventing ‘duplicative’ recoveries.

If non-business levels, such as ultimate consumers, also sue, the ‘yardstick’ and the ‘pré-violation and post-violation’ techniques will also remain useful. The damage suffered by ultimate consumers is at least the amount of the initial overcharge that is not absorbed by intermediate levels in the form of diminished profits (the same techniques, applied to the defendant’s prices, can be employed to estimate the initial overcharge).<sup>918</sup> With this technique, it is thus possible to calculate whether ultimate consumers did suffer ‘damages’ in excess of the absorbed portion of the initial overcharge if the defendants or intermediate purchasers used a ‘percentage mark-up’ system, which magnifies the overcharge at subsequent purchaser levels.<sup>919</sup>

The right to recover tax-money paid under *ultra vires* demand is also a *prima facie* right only, because it is partly premised on the rationale of good governance. Though by holding that such a right is only ‘prima facie’ one is not necessarily saying that the right must by its nature be absolute, what however transpires from labelling or treating a right as ‘prima facie only’ is its susceptibility to being an interest that can be overridden by indeterminate policy considerations.<sup>920</sup> And such susceptibility to be overridden by policy considerations brings that right within the sphere of those rights that usually resemble a legitimate expectation. And if a ‘right’ is treated like a legitimate expectation, the weight that the courts will attach to such ‘legitimate expectation’ will vary with the context.<sup>921</sup> Non-fundamental rights are often specifically designed to be rather vague, precisely so that courts can engage in a ‘balancing exercise’ between the individual right

<sup>918</sup> D. Berger & R. Bernstein (1977) 86 *Yale LJ* 809, 862 and 877-878.

<sup>919</sup> *Ibid* 878.

<sup>920</sup> J. Adler (2002) 22 *Legal Studies* 165, 168-170.

<sup>921</sup> J. Adler (2002) 22 *Legal Studies* 165, 168.

and the broader public interest.<sup>922</sup> This indeed is what is observed in a considerable number of American cases that have applied a passing on defence or similar fact scenarios where objectively the private law right to restitution is either directly or indirectly ousted by a legislative provision in the court's interpretation and adjudication of the facts.<sup>923</sup>

The defence of change of position however is also distinguishable from the defence of passing on (when this is available in a legal system) in at least two further aspects, though both defences share one thing in common, that is to say, they are both concerned with events causally related to the defendant's gain.<sup>924</sup> The first aspect distinguishing them is related to the point of focalization in the claim itself. While change of position focuses on the defendant's enrichment (gains received), passing on focuses on the claimant's loss (detriment or injury suffered). When change of position is established, the defendant is not required to restore the enrichment received if his assets are no longer swollen by the said benefit. By contrast, the defence of passing on is directed at ensuring that the claimant is only awarded restitution when he has suffered a corresponding loss. Thus, where the conception of the unjust enrichment doctrine encapsulates a mirror-image loss-gain requirement, passing on defence has greater chances of recognition and a fertile ground for development than in a legal system that does not require such mirror-image between gain-loss.

The second aspect differentiating these defences is the fact that change of position is mostly concerned with security of receipt, an ideal that ensures that the defendant be able to freely deal with what he considers as his own wealth without fears of being put in a situation to continuously guard against the danger of unexpected unjust enrichment

<sup>922</sup> See for example the analysis of 'Non-absolute fundamental rights' in the context of European Community Law by C. Hilson (2004) 29 *European LR* 636, 640. For the author, 'when a right is classified by its nature as fundamental, it can be argued not only for the broad interpretation of the initial or prima facie right, but also for a narrow interpretation of the exception to that right'. Thus, explains the writer, that ordinarily exceptions to a right must be interpreted restrictively.

<sup>923</sup> See for example what D. P. Visser says of South African law discussed above in (2004) *Annual Survey of South African Law* 280-283; (2005) *RLR* 205.

<sup>924</sup> M. Rush, *The Defence of Passing on* (2006) 179.

claims.<sup>925</sup> In the case of passing on, however, there is no such concern. The concern in the change-of-position defence to secure the security of receipt is a matter of both principle and of wealth maximization. It is a matter of principle, because it prevents the defendant from indemnifying himself at the expense of, or to the detriment of, an innocent defendant.<sup>926</sup> And it is a matter of wealth maximization because if receipts were not secure, there would be a need to forsake potential investment opportunities of one's wealth by setting up contingency insurance plans against the continuous risks of unjust enrichment suits, thereby sterilising one's wealth.<sup>927</sup> In the case of passing on defence, however, such a concern does not really apply, because the claimant receives nothing and for that reason, the law does not have anything to protect.<sup>928</sup> For this reason, Rush for example, thinks that passing on has actually the potential to stifle economic activity and promote misallocation of resources. The same reasoning on stifling economic activities seems also to be supported by some EU commentators, such as Graig & de Burca<sup>929</sup> who address the defence of passing on mostly in antitrust (competition) context and in the context of analyzing the implications of the *Irks-Arkady* cases decided under Art. 288 of the EC Treaty.

This analysis shows us once again that it is very important to consider in unjustified enrichment doctrine, the way the enrichment came about, as advanced by Flume long ago.<sup>930</sup> The way the enrichment came about, not only may have a say how the enrichment liability is calculated and its extent, but also whether there can be a claim at all, and if there is one, how can a defendant safeguard his interests in defending himself.

#### 5.10. Conclusion.

<sup>925</sup> P. B. H. Birks, *Unjust Enrichment* 2<sup>nd</sup> Ed. (2005); M. Rush, *The Defence of Passing on* (2006) 170.

<sup>926</sup> W. A. Keener, *A Treatise on the Law of Quasi-Contract* (1893); *Restatement (First) of Restitution* (1937) § 142.

<sup>927</sup> M. Rush, *The Defence of Passing on* (2006) 171.

<sup>928</sup> For more details on this position see again M. Rush, *The Defence of Passing on* (2006) 180.

<sup>929</sup> Graig & de Burca, *European Union Law* (2003) 571. The *Irks Arkady v Council Commission* (case No. 238/78, 1979 ECR 2955) cases are also known as part of the *Quellmehl* group of cases cited earlier.

<sup>930</sup> W. Flume 'Der Wegfall der Bereicherung...' (1953) 103.

It has been noted earlier in this study that the defence of change of position has two versions: the 'reliance version' and the 'disaster version'. On the reliance version, as explained in chapter 1 and 3, the defendant is absolved in full or in part from liability in restoring the benefit received at the expense of another, because on the faith of receipt he has disposed of that benefit in the belief that it was his own; on the 'disaster version', the defendant is absolved from the obligation because the benefit received has been lost in circumstances in which he is not to blame,<sup>931</sup> regardless whether it was received in good faith or in bad faith. In both versions, requiring him to 'disgorge the benefit received, which no longer exists, would be equivalent to seeing him as the insurer of the plaintiff'<sup>932</sup> and expecting him to 'deplete his own assets which are no longer, or have not been swollen, by the defendant's wealth, and such fact would be utterly inequitable.

If these considerations are applied to 'public authorities' in the context of 'improperly' charged taxes, for example, the reliance version would *prima facie* be often easily satisfied, because in the ordinary course of events, the defendant (public authority), is expected to disburse the tax-money collected in public projects, and by so doing, it can analogously be said that it indeed disposed of the assets in good faith in the assumption that it were its own assets. The problem, however, is with the other element of the change-of-position doctrine, viz, the so called 'but for requirement'. Change of position is only available in the reliance version to a defendant who can establish that 'but for the receipt' he would not have undertaken the action or activity in which he spent the benefit (usually money). Can the State/Government (or other public authority) prove that but for the receipt of the 'inappropriate tax-money' it would not have undertaken the said public projects? Any citizen expects public authorities to undertake public projects, and for that

<sup>931</sup> D. P. Visser (2008) 718 analyzing German law describes also two versions of the defence there. Citing Schulze et al, *BGB Handkommentar* § 818 marginal note 10, he notes that one version of loss of enrichment is 'an enrichment falling away without a substitute' ['Bereicherung die ersatzlos wegfallen'], while the other 'loss of enrichment constituted by detrimental side-effects' entails mostly 'expenditure in respect of that which had been received – such as the fact that the enrichment-debtor paid freight costs, or taxes, or storage fees, or the costs of repair of a thing which had been obtained without a legal ground'. This second aspect is essentially the reliance version I have been referring to, though there are some nuanced differences, and the first may essentially correspond to the 'disaster version'. The 'uneconomical use of a benefit' which is a further way an enrichment can be lost (as provided for by T. Krebs (2001) 281, is essentially a 'disaster version' of the defence on my analysis.

<sup>932</sup> L.D. Smith (2001) 79 *Texas LR* 2115, 2149.

reason taxes are paid. It is a primary duty of public authorities to undertake public projects. It can, however, be argued that Governments (public authorities) envisage realizing their projects on 'budgetary projections' (i.e. according to what they think they will be able to 'collect' from taxpayers and other ventures) and not necessarily with reserve funds already in their pockets. Therefore, if such projections could only be made because the government relied on the sources of the funds (including the challenged source) then, this could qualify as the 'but for' requirement'. If the government had then known that the resources it had projected (and collected) in good faith could later become the subject of an unjust enrichment claim, it could not have projected and spent the money as it did. Therefore it is entitled to the defence of change of position on this ground.

In reply to this contention one could say that because of the attempt to rely on the 'illegal instrument' (*ultra vires* legislation), the claim would be automatically invalidated. So, too, if the claim could be barred because of the illegality, so too the defence should have the same fate. In other words, there is no *causa retinendi*, and therefore the defence is inapplicable. Seen simply from the perspective of the *condictiones* this is a simple case of a *condictio ob causam finitam*.

On the other hand, if the benefit received has been lost due to a disaster, such as a 'drastic and unexpected and unpredictable economic disaster', or where the benefit received was money and there has been a sudden and uncontrollable inflation of the currency, which has wiped out both private and state's wealth, and such a situation does not depend on the local authorities, in principle, the defence could be available to the state. Of course in these circumstances, the state could pre-empt the institution of any such a claim by enacting a special statute or simply by declaring a state of emergency, suspending most of private rights. But assuming that the state does not reach such a stage, it could still successfully argue, in my view, a defence of change of position, which is viable both in principle and on policy grounds.

Can the government argue that it was undertaking the special project because it expected to receive from its 'budgetary projection' the specific money from the claimant, or was it expecting to receive it from the general pool of taxpayers?

Obviously, if the plaintiff be a very large corporation or a conglomerate of corporations, there may be some merits in this argument, for the contributions of a large corporation may amount to millions if not billions of Rand (or dollars). For that very fact it is reasonable for the government in its general accounting books to expect a substantial contribution from that corporation or conglomerate of corporations, and can envisage a special project in the expectation of that substantial contribution. To illustrate this point, let me consider the ZARAS scenario given at the beginning of the chapter. The simple mathematics tells us that it was almost certain that the Government relying on the 25 cents of a Rand and knowing the normal behaviour and drinking needs of its population, would be able to collect both the R 390 millions from the beer industries and the R 1,950 billion from the soft drink industries. It is not also unreasonable to think that it could set up a special account for those amounts. With this example is it then unreasonable to think that the authorities could have envisaged spending, and did in fact spend, say, the exact R 1,950 billion in the construction of a public road in reliance on that fact they money was theirs, or expected to be theirs and undertook the project before it was discovered that the regulations were invalid?

Though the argument may seem attractive and forceful, the difficult, however, of accepting such argument is that when the government collects tax money it first goes to a 'pooled fund account', regardless how many accounts the government opens for practicality reasons, and from the 'pooled account' the government made (or envisaged) its projections based on the total sum in it (or the expected total sum to be in it). So, it is incredibly difficult (if not directly impossible) to prove with substantial detachment that a specific sum of money expected from one taxpayer is the one that was destined to and used in that particular project. Therefore, given such near impossibility of establishing the 'but for' requirement, the defence of change of position should not be available to a public body.



Having concluded that change-of-position should not be available to public authorities, does that mean that in order to maintain symmetry in the system should equally the defence of passing on be made automatically unavailable to public authorities as well? We saw above that these defences respond to different policy considerations. One is concerned with ensuring security of receipt and focus on the gain acquired, while the other is intended, when it is accepted, to thwart the possibility of the ‘unjust enrichment’ of the plaintiff at its customer’s expense. Though the dictates of one are not necessarily the same as those of the other, it may make sense to require such symmetry. But the example given at the beginning shows, and many other jurisdictions do attest, that should the passing-on defence be denied on principle, the legislature may act quickly to pass a statute enacting the defence through legislation. In sum, passing on can be ruled out only if there are sound policy considerations to do so. It is defensible in principle, though the practicalities might complicate its application.

## 5.11. Should South Africa Venture into the Passing-on Forest?

### 5.11.1. *The Emerging View.*

Discussing the South African approach above, it is clear that the country does not yet have an ‘official pronouncement’ as to whether to sanction or reject passing on in its unjustified enrichment law. All that can really be said is that looking at how the field is conceived the ground could indeed be fertile for such sanctioning. The system requires a mirror-image ‘gain-loss’ and that is one of the strongest arguments in passing on issues. Mention, however, was already made that Visser in his recent book explored slightly the waters, and advanced what I would call a preliminary view,<sup>933</sup> which may eventually take hold in the country or be refined as other theorists and the courts confront the

<sup>933</sup> I opt calling it a preliminary view because if one looks at, and compares the detailed discussions of other defences in the book and other writings of the author, and the bird-eye-view devoted to passing on, the imbalance indicates that the author did not explore several contours of the defence, but might do so in the future and eventually refine the preliminary view.

practicalities of the issue. Thus far, that proposition is essentially a ‘no defence’ approach, save where it is sanctioned by legislation.

In Visser’s preliminary view, South African law should not venture into a passing on defence due to the complexities inherent in proving its extent.<sup>934</sup> In the light of the detailed discussion above that highlighted such complexities, it is fully reasonable to give credit to the ‘no defence’ view in order to spare the courts the nightmare of venturing into the thick forest of econometrics and statistical evidence chiefly based on economic assumptions and estimates. The ‘no defence’ view would also be supported by the following additional arguments: (i) Allowing passing on defence in any fashion would directly or indirectly undermine the rule of law (or the principle of legality). It does so directly because where ‘illegality’ has been sufficiently proved, the government is nonetheless allowed to get away with it.<sup>935</sup> It does undermine it indirectly because by allowing the government to plead passing on the system is incidentally discouraging claimants with genuine cases, or who sufficiently know of the government’s ‘impropriety’ in imposing taxes or other ‘misconducts’ from bringing actions against the government. They are discouraged because by knowing that they might be overwhelmed with the evidentiary burden of disproving passing on in their business operations. In this sense, the rule of law is undermined as the system takes away or dilutes the right of the citizen to challenge government misconduct by imposing on him a burden of proof that might be complex and costly. (ii) Passing on should also be rejected for its inherent tendency to put excessive strains in the judicial system by trying to reconstruct ‘price and output decisions’ in the courtroom.

In spite of the above propositions, almost all proponents of ‘no defence’ argument agree that, in principle, the defence is ‘sound’ and logical, discarding it only for policy considerations.<sup>936</sup> As a result what the conventional wisdom really advocates is letting

<sup>934</sup> D. P. Visser, *Unjustified Enrichment* (2008) 752.

<sup>935</sup> D. Berger & R. Bergstein (1977) 86 *Yale LJ* 556 note 222.

<sup>936</sup> D. P. Visser agreeing with McInnes on this point puts this way: ‘the notion that an action based on unjustified enrichment should not be used to enrich the plaintiff is one which no-one would oppose in principle...but the logistics of giving effect to that idea through the defence of passing on would be just to much’ (D. P. Visser, *Unjustified Enrichment* (2008) 752); M. McInnes 1997 19 *Sydney LR* 179 at 199.

things be simple and expeditious. Is it then a sound policy for a legal system to completely give up a principle it recognises to be defensible merely because of the complexities of proof? Are such complexities insurmountable in any and every case that may raise a passing on situation?

The main policy being protected with the ‘no defence’ view, however, seems to me to be chiefly the administrative convenience of simplicity and expediency, apart from what along the discussion was termed as ‘the principle of legality’ or, put in other words, the policy of divesting illegal taxes to safeguard the rule of law. I fully agree that this approach accords rationality in the decision making process, and ‘if tax-refunds are to be restricted to those who ‘bear the burden of the tax’, then perhaps the legislature, rather than courts or academics, are the proper source of such rules<sup>937</sup> and that the private law of unjustified enrichment might be ill-equipped to absorb the complexity necessary for such decision making. However, let us not lose sight of one thing: the problem with the ‘no defence’ approach is in its very simplicity, especially in tax matters. The ‘no defence’ approach seems to overlook or underrate a legitimate view expressed in any fiscal legislation that a tax refund should not overcompensate plaintiffs; or in other words, it should not enrich them at the expense of innocent taxpayers. Furthermore, the ‘no defence’ approach in tax area does not capture the full complexity and subtleties that may lie beneath decisions in this area<sup>938</sup> as it may lack the flexibility to operate across a range of cases in unjustified enrichment in which courts might encounter a passing on defence. That being the case, is there any way out that might capture those subtleties and deal with the complexity without destroying the rationality, predictability and certainty of the decisions that the ‘no defence’ approach safeguards?

#### 5.11.2. *An Exploratory Road-Map to a Qualified Passing-on Defence.*

<sup>937</sup> W.J. Woodward (1985) 39 *U Miami LR* 873, 930; B Alarie, ‘Kingstreet Investments: Taking a Pass on the Defence of Passing on’ at [http://papers.ssrn.com/so13/papers.cmf?abstract\\_ID1023789](http://papers.ssrn.com/so13/papers.cmf?abstract_ID1023789).

<sup>938</sup> W.J. Woodward (1985) 39 *U Miami LR* 873, 930.

To answer the questions above we may need to draw some lessons from competition (antitrust) law, as the situations leading to possible passing on in unjustified enrichment are to some extent similar or analogous to those arising under competition law, namely the allegations of ‘price-increase’, ‘shifting fully or partially the burden of a price-increase’, using ‘control-mechanisms’ such as ‘increasing outputs’ or ‘decreasing input-costs’, ‘using substitutes’, etc.

Though the task of proving passing on is difficult and complex as acknowledged by economists, the difficulties should not be overstated. It is plain that in real life not all situations in which passing on is at issue present similar fact-patterns. For this reason the difficulties can be qualified and in appropriate cases may even be ‘discounted’. That is so because in various circumstances in which the claimant will challenge the extent of passing on, he will likely do so by alleging that it lost profits as a result of the imposition of the inappropriate tax. If that is the case, then, one must consider the claimant’s pricing methods<sup>939</sup> in the operation of its business, as well as the following other scenarios:

First, one must recognise that in estimating the ‘extent of the lost profits’, the lost profits are equal to the difference between the profits actually earned and the profits that would have been earned ‘but for’ the imposition of the inappropriate tax.<sup>940</sup>

Secondly, where the alleged ‘inappropriate’ tax was by its nature supposed to have been absorbed by the claimant and not to be passed-on to consumers, but the claimant nevertheless overcharged them, such consumers as ultimate taxpayers may have paid in excess of the unabsorbed portion of the initial value of the inappropriate tax if the claimant used a percentage mark-up pricing system which magnified the said tax to the ultimate consumers.<sup>941</sup> In such cases, allowing an unqualified tax recovery has the potential to render the award duplicative, because the claimant may be seeking to recover from an ‘loss’ (or an injury) actually fully borne by another person, that is to say, it might

<sup>939</sup> The discussion on pricing methods amenable to passing on was described above. It is the mark-up pricing, which various industries routinely use. (See note 877 above and accompanying text).

<sup>940</sup> R. D. Blair & J. L. Harrison (1999) 68 *George Washington LR* 1, 36-38.

<sup>941</sup> D. Berger & R. Bergstein (1977) 86 *Yale LJ* 862.

have recouped fully its losses either through ‘backward-shifting’ or ‘forward-shifting’, and now wants to recover them again from the government by an enrichment action. So, disallowing passing on defence to the government, it opens the doors to claimants being ingeniously awarded duplicative recoveries.

Thirdly, in most (if not all) cases, in which the claimant might dispute the extent of passing on, what will come to the fore is, in effect, a situation akin to apportionment of damages. For the claimant to prove its part of ‘losses suffered’ it must produce evidence of such loss or ‘injury’ to the business due to the imposition of the tax. Such evidence must reasonably be clear or reasonably inferred, even if based on estimates. That is so because a reasonable inference differs from mere speculation. Admissible damage estimates must be more than a stab in the dark. That onus befalls upon the claimant as it is the only party in a position to do so.<sup>942</sup> Lost profits (or damage) estimates will be deemed insufficient as a matter of law, and therefore inadmissible, if they are the product of mere speculation and guesswork.<sup>943</sup> Because judges cannot be asked to speculate, insufficient ‘damage/ ‘injury’ evidence cannot be put before the judge.

<sup>942</sup> See *McKesson v Division of Alcoholic Beverages* 496 U.S. 18, 31;110 L.Ed 2d 17 (1990) at 43. ‘Because it is the taxpayer and not the [Revenue] Commissioner, that understands the intricacies of the taxpayer’s industry and is in possession of the sales data to establish such a thing as pass through and diminished market share’. In the same vein, Judge Neel of the Supreme Court of West Virginia, in *State of West Virginia (Dept of Tax & Revenue v Exxon Corporation* [(1993) case No. 21573 – January 1993 Term], granting a writ of prohibition in favour of the State in similar situation, had this to say: ‘West Virginia will compensate taxpayers only for the amount of the tax they absorbed and did not pass through to consumers and for any loss of market share attributable to the unconstitutional tax. Claimants should be prepared to furnish this kind of information in order to show the amount of the unconstitutional tax they absorbed and the market share they lost as a result of unconstitutional tax. The amount of tax absorbed is determined by a Tax Incidence Analysis. The focus of this analysis is the relationship between the elasticity of demand and the elasticity of supply as well as the relationship among input costs, revenues, taxes and product prices’. In this case, the State had sought a writ of prohibition to prevent the Circuit Court of Kanawha County from entertaining a declaratory judgment action to settle a dispute between Exxon and the Tax Department. Exxon asked the Circuit Court to declare ‘Administrative Notice 91-15’, which described the procedure that Exxon had to follow to obtain tax-refund, unconstitutional, because the US Supreme Court had already held that States in case of tax-refunds had to afford claimant a meaningful relief, which entailed paying the unconstitutional tax retroactively.

<sup>943</sup> For example, in a similar fact scenario other American cases such as *Home Placements Service Inc v Providence Journal Co* 819 F. 2d 1199, 1205 (First Cir. 1987) have found that ‘damages awarded according to the lost-profit measure’ are inappropriate where the plaintiff ‘has introduced no evidence tending to establish comparability between its own business and other companies engaged in similar business pursuits’.

Fourthly, one should also recognise that the difficulties of estimating lost profits (or other variables) are no worse than those associated with estimating overcharge. For the later, one must establish the price actually paid, which is usually available from normal business records.<sup>944</sup> This actual price is compared to the price that would have been paid 'but for' the 'imposition of the inappropriate tax' – the same way that it happens in competition law for the 'price-fixing' claims.<sup>945</sup> The 'but for' price is the price that unimpeded forces of supply and demand would have produced. One must however admit here, as it was explained already elsewhere, that to achieve a satisfactory result, the estimation must take into account a variety of economic and 'demographic'<sup>946</sup> factors that influence supply and demand. This effort is not apt to be completely successful and therefore, some degree of imprecision will infect the estimation of the 'but for' price.

Fifthly, to avoid having a 'damage'/'injury' estimate characterised as speculative, certain steps must be taken. For one thing, a plaintiff claiming lost profits during the alleged 'damage period' should have a history of profitable operations in the past. In estimating what the profits would have been 'but for' the tax imposition (like in an antitrust violation), the plaintiff must consider other factors that would have influenced the profits during the 'damage period'. Some factors – growth, enhanced efficiencies, and reduction in competition – may have caused profits to rise, while other factors – such as increased costs, increased competition, regulatory changes – may have caused profits to fall.<sup>947</sup> Accounting for every potential influence may not be possible, but the most important components should be examined.

These suggestions may seem too technical, adding further complexity and not helping at all to simplify the administration of justice in such cases, especially where expediency in

<sup>944</sup> For a recent mark-up pricing study in South African industrial context see J. Fedderkea et al (2007) 16 *African Journal of Economics* 28-69. A similar publication is also available at this site: [http://www.commerce.uct.ac.za/Economics/staff/jfedderkea/Documents/2006/markup14jae2\\_v3.pdf](http://www.commerce.uct.ac.za/Economics/staff/jfedderkea/Documents/2006/markup14jae2_v3.pdf).

<sup>945</sup> R.D. Blair & J.L. Harrison, (1999) 68 *George Washington LR* 1, 38.

<sup>946</sup> By 'demographic factors' here I mean such things as the 'nature' of buyers, whether low income, middle income or high income earners; the importance of the product or service traded to the buyers such as whether it is something the buyers by their nature, culture, tastes, and inclinations, etc, can live with or without, thereby influencing the level of its demand and supply.

<sup>947</sup> R. D. Blair & J. L. Harrison, (1999) 68 *George Washington LR* 1, 37.

tax-refunds should be the rule. However, our legal system is procedurally equipped to use expert evidence in appropriate cases. This area might be one in which experts may be useful to assist the courts in the determination of the extent of passing on where the claimant pleads that it did not fully pass-on the tax due to various factors affecting the business. The outcome can be much more reasonable than the outright 'no defence' approach. As the onus of proof in showing that he did not pass-on fully the tax is on the plaintiff, it will also be equipped to have such evidence. In short, despite some apprehension, I am of the view that we may cautiously admit a qualified form of passing on defence in the South African law of unjustified enrichment in cases of 'inappropriate tax' demands if a full refund would indirectly 'overcompensate' or compensate twice the plaintiff after recouping its losses. Such result would be inequitable and infringe the very purpose of an unjustified enrichment claim. This suggestion is an exploratory road-map alone, and its possible implementation is subject to the legal system maintaining its current 'mirror-image gain-loss' in the unjustified enrichment doctrine as a whole, for if that relation is altered, the all suggestion falls away.

In sum, where there has been an inappropriately charged tax due to the unconstitutionality or illegality of the imposing legislation or norm, the claimant has a *prima facie* right to recover in full the tax so paid. However such right may be partially or entirely curtailed and the claimant denied restitution or the extent of recovery diminished if there are militating policy considerations to do so and the evidence clearly points to curtailing such *prima facie* right in the following scenarios:

- (i) Where the tax was not meant to be passed-on due to its nature and purpose, but had to be borne by the claimant, and the claimant nevertheless passed it on direct or indirectly to the consumers as higher price or otherwise, such as through 'back-shifting', or other mechanisms, the right to recover the said tax may be diminished according to the extent of the loss or extinguished altogether if losses have been fully recouped.

- (ii) In the assessment of the extent of the loss, the court must first ascertain the nature of the tax at issue, the pricing mechanism used by the claimant, and any other relevant factors, as long as it remains objective.
- (iii) The claimant bears the onus of proof<sup>948</sup> and must supply such evidence when alleging that it suffered loss as a result of the imposition of the said tax.
- (iv) Miscalculation or error in the computation of the tax either by the Revenue Service or by the claimant cannot be invoked for any form of passing on.

Where the case does not lend itself amenable to percentage mark-up pricing, the problems of proof may be more difficult. In each case, however, the court should enquire into those problems to determine whether proof of passing on is infeasible. Only then does the conflict between the positive and countervailing policies become irreconcilable. Under such circumstances, it may be appropriate to preclude a passing on defence in order to ensure that the principle of legality is not undermined.

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<sup>948</sup> Slightly contrary to this proposition would be the European Union which to some extent holds that 'any requirement of proof which has the effect of making it virtually impossible or extremely difficult to secure the repayment of charges levied contrary to Community law would be incompatible with Community law'. See *San Giorgio (Amministrazione delle Finanze dello Stato v SpA San Giorgio)* (case 199/82, [1983] ECR 3595, para 13); See also D. P. Visser, *Unjustified Enrichment* (2008) 748 note 248 and *Baines v Commissioner for her Majesty's Taxes* [2005] EWHC 2300 (ch), para 6. But these observations are only relevant if it is extremely difficult to adduce the evidence, which is not the case if 'mark-up pricing' was indeed used.



## CHAPTER VI.

### GENERAL CONCLUSION.

The argument advanced throughout this thesis is that, once a legal system accepts the general principle against unjust or unjustified enrichment, it will also have to curb its potential broadness either through the defence of change of position/loss of enrichment or by other means. The model of unjustified enrichment adopted by a legal system will also determine its defences and their scope. Change-of-position is a more robust and all-encompassing defence to overcome potential injustices than other enrichment defences which operate only in particular contexts. The limitation of the general principle through the subsidiarity rule, which indirectly and implicitly amounts to a 'defence' to an enrichment claim by curtailing it at the liability stage, is also vulnerable to unjust outcomes<sup>949</sup> as it may put off well deserving cases.

The discussion demonstrates that enrichment law is now to greater or lesser extent entrenched as a separate branch of the law of obligations in all five jurisdictions under consideration, and that despite its inevitable link to equity,<sup>950</sup> it is a general principle of law at the same level as all other

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<sup>949</sup> See in this regard the discussion under Brazilian law above in chapter four, part II: 'Defences', as well as the occasional treatment of the subsidiarity notion throughout the thesis. I deal in detail with the subsidiarity concept in unjustified enrichment claims (also in comparative perspective) in a separate publication to appear shortly elsewhere. For further references see also the study group for the European Civil Code, which has directly obliterated the concept of subsidiarity from the DCFR (March 2009) in Book VII of the Draft. The only exception apparently allowed is at art. VII - 6: 104 of the DCFR which says that the 'enrichment book does not apply where the enrichment is obtained as a result of the disadvantaged person's benevolent intervention in the enriched person's affairs', or said differently, the enrichment claim is disallowed where *negotiorum gestio* applies. The DCFR also sanctions change of position or loss of enrichment as a general defence (see DCFR VII – 5: 101), and obviously the general principle appears at the beginning of the book at VII – 1:101 as the basic rule (1) "A person who obtains an unjustified enrichment which is attributable to another's disadvantage is obliged to that other to reverse the enrichment". New insight on subsidiarity can also be gained from the Scottish case *Transco Plc v Glasgow City Council* (2005) SLT 958 and commented upon by N. R. Whitty at (2006) 10 *Edinburgh LR* 113-132.

<sup>950</sup> See D. P. Visser, *Unjustified Enrichment* (2008) Chapter 12.

major categories.<sup>951</sup> The major difference between the various systems is more in the scope that is ascribed to the principle than its denial, save exceptions. English law (or the common-law in general), after a long journey through the vagaries of quasi-contract, implied contract and 'restitution' forests, has now finally arrived at its destination of fully sanctioning the unjustified enrichment doctrine as a general principle founded on the concept abhorring the retention of any 'benefit' acquired at the expense of another in the absence of basis.<sup>952</sup> The 'absence of basis' has been 'introduced' by Peter Birks in English law and, in my view, this approach is currently taking firm hold in England and the trend now seems to me as probably irreversible.<sup>953</sup> Such 'absence of basis' is, however, cast in a special 'pyramid' scheme whose 'lower layers' are still formed by unjust factors<sup>954</sup> with the 'absence of legal basis' as if the 'super unjust factor', by which Birks meant 'a single proposition covers every case: an enrichment at the expense of another is unjust when it is received without explanatory basis'.<sup>955</sup> In the determination of 'basis', the new approach uses both an objective and a subjective test.<sup>956</sup> The determination is generally objective when the claim is related to 'obligatory enrichment'; and it is subjective in relation to 'voluntary enrichments'.<sup>957</sup> In such new approach change of position becomes increasingly important.

For American law, in turn, the ideals driving its current reform or restatement continue in the footsteps of Keener & Costigan's assertion, as modified with time, that 'the principle which forbids the defendant enriching himself at the expense of the plaintiff should also clearly forbid the plaintiff indemnifying himself at the expense of an innocent and blameless defendant'.<sup>958</sup> The new *Restatement of Restitution and Unjust Enrichment* closely adheres to the traditional

<sup>951</sup> See chapter one and two above for more details. But see contrary views supported as late as the year 2001 among others by Alan Farnsworth in American law (E.A. Farnsworth et al, *Contracts: Cases and Materials* 6<sup>th</sup> Ed (NY 2001) who still thought that unjust enrichment is an appendage of contract; or J. Rogers (2007) 42 *Wake Forest LR* 55-99, who thinks that 'the law of restitution' is an appendage of property law; or still as D. Rendleman and D. Laycock who collectively take the view that 'Restitution' is just a remedy to be bundled together with many other remedies such as injunctions (interdict or other mandatory devices), specific performance, declaratory relief, damages calculations, etc. See generally C. Saiman (2008) 28 *Oxford JLS* 99 at 102.

<sup>952</sup> P. B. H. Birks, *Unjust Enrichment*, 2<sup>nd</sup> Ed (2005) 116; see also T. A. Baloch (2007) 123 *LQR* 636; & C. Saiman (2008) 28 *Oxford JLS* 99.

<sup>953</sup> Not everyone however will agree that the trend is almost irreversible, as the unjust factor approach is deeply entrenched in case law and the change might be a little unsettling in some cases.

<sup>954</sup> P. B. H. Birks, *Unjust Enrichment* 2<sup>nd</sup> Ed. (2005) 11-117. Birks uses 'unjust factors' as tools to indicate when the basis can fail.

<sup>955</sup> P. B. H. Birks, *Unjust Enrichment* 2<sup>nd</sup> Ed. (2005) 116. See also T. A. Baloch (2007) 123 *LQR* 636, at 639.

<sup>956</sup> Contrast this position with the German position under § BGB 812(1) which uses an objective approach. See generally R. Zimmerman and J.E. Du Plessis (1994) *RLR* 14.

<sup>957</sup> T. A. Baloch (2007) 123 *LQR* 636, 641.

<sup>958</sup> (1906) 20 *Harvard LR* 205, 215.

American view, the liberal philosophy encapsulated in the general principles abhorring non-consensual transfers and forced exchanges.<sup>959</sup> While traditionally the American law of restitution is rooted in the ‘unjust factor’ approach, the current *Restatement of Restitution and Unjust Enrichment* technically takes no position face to the switching allegiance of English law from the ‘unjust factor’ to the ‘legal ground’ approach, but the *Restatement* firmly claims that ‘instances of unjustified enrichment are both predictable and objectively determined because the justification in question is not moral but legal’.<sup>960</sup> For some commentators the *Restatement’s* silence is due neither to intellectual timidity, nor to its inability to decide between the competing theories;<sup>961</sup> but it is rather that the *Restatement’s* ‘failure’ to address the issue proceeds from the assumption that nothing turns on this debate. For many American scholars and theorists,<sup>962</sup> and even a considerable body of judicial statements (case law), supports the view that it is ‘irrelevant’ as to whether the field is described in terms of ‘unjust’ or ‘unjustified’ enrichment.<sup>963</sup> It must however be noted that, in addition to Louisiana’s enrichment law, which is inspired by the civil-law, three other ‘common law’ jurisdictions (states) include clearly the ‘absence of legal justification’ as an element of the *prima facie* case of unjust enrichment. Thus, claimants in North Dakota, Arizona and Delaware, in addition to the other ordinary elements,<sup>964</sup> must prove an ‘absence of basis’ to succeed in an enrichment claim.

Canada as said in the first chapter has firmly moved to the ‘absence of juristic reason’ approach as clarified in *Garland’s*<sup>965</sup> case. In all these jurisdictions change-of-position assumes increasingly a vital role as the principal defence to enrichment claims.

When change of position/loss of enrichment is the avenue chosen to curb the wide enrichment principle, such limiting mechanism will manifest itself in two different variants, namely the

<sup>959</sup> See generally M. P. Gergen (2005) 13 *RLR* 224, 225; and M.P. Gergen (2002) 71 *Fordham LR* 709.

<sup>960</sup> *Restatement (Third) of Restitution, Discussion Draft* at § 1, Comment b.

<sup>961</sup> C. Saiman (2008) 28 *Oxford JLS* 99, 121, footnote 123.

<sup>962</sup> These academics include the Reporter, A. Kull, who as recently as 13 December 2007, in exchange with the Canadian professor J. Neyers at the *Restitution Roundtable* held at Washington and Lee Law School, defended such position. See C. Saiman (2008) 28 *Oxford JLS* 99, 121 footnote 124.

<sup>963</sup> See *Restatement (Third) of Restitution* § 1 comment b, and Reporter’s notes; C. Saiman (2008) 28 *Oxford JLS* 99, 121, footnote 123-125. See the note immediately below for examples of judicial statements.

<sup>964</sup> The full extent of an enrichment claim in these jurisdictions requires (i) and ‘enrichment’; (ii) an impoverishment; (iii) a connection between the enrichment and the impoverishment; (iv) absence of justification for the enrichment and the impoverishment; and (v) an absence of a remedy provided by law’. See particularly the recent cases *McGhee v Mergenthal*, 735 NW 2d 867, 872 (ND 2007); *Jackson National Life Insurance Co v Kennedy* 741 A 2d 377, 393-94 (Del Ch. 1999); *Trustmark Ins. Co v Bank One, Arizona, NA* 48 P 3d 485, 491 (Ariz. App 2002).

<sup>965</sup> *Garland v Consumers Gas* [2004] SCC 25; [2004] 1 SCR 629; (2004) 237 DLR (4<sup>th</sup>) 385 (roughly at pages 40-46 on the SCC Report).

‘reliance version’ and the ‘disaster version’. On the reliance version, as explained in chapter one above, the defendant is absolved in full or in part from liability in restoring the benefit received at the expense of another, because on the faith of receipt he has disposed of that benefit in the belief that it was his own; on the ‘disaster version’, the defendant is absolved from the obligation because the benefit received has been lost in circumstances in which he is not to blame,<sup>966</sup> regardless whether it was received in good faith or in bad faith. In both versions, requiring the defendant to ‘disgorge the benefit received, which no longer exists, would be equivalent to seeing him as the insurer of the plaintiff’<sup>967</sup> and expecting him to ‘deplete his own assets which are no longer, or have not been swollen, by the defendant’s wealth, and such fact would be utterly inequitable.

If a legal system deliberately or otherwise omits loss of enrichment as the general defence, it will still find ways to circumscribe the liability under unjustified enrichment doctrine. One such approach is the general tendency of cases falling within the ambit of loss of enrichment being either denied outright at the liability stage or, if they do go forward, they might be framed and defended in part under the norms dealing with impossibility of performance in general. In this last version, special reliance is placed on the good faith doctrine. Depending on whether a system is codified or un-codified, there is almost a need of a complex cross-referencing between various sets of rules and doctrines.

In the categorization of bad faith (as the reverse of the good faith doctrine), which thwarts the defence, it is proposed that where the defendant has received money, he cannot generally raise the defence of change of position or loss of enrichment, if he spends it in the knowledge that the claimant does not or did not mean him to have it, and he (the claimant) is legally entitled to have it back. The same applies where such knowledge would have been regarded by the world at large as sufficiently clear enough, and would constitute an outcry to the public for the court to side with the defendant, if spending the money in the circumstances would be regarded as a dishonest thing

<sup>966</sup> D. P. Visser (2008) 718 analyzing German law describes also two versions of the defence there. Citing Schulze et al, *BGB Handkommentar* § 818 marginal note 10, he notes that one version of loss of enrichment is ‘an enrichment falling away without a substitute’ [‘Bereicherung die ersatzlos wegfallen’], while the other ‘loss of enrichment constituted by detrimental side-effects’ entails mostly ‘expenditure in respect of that which had been received – such as the fact that the enrichment-debtor paid freight costs, or taxes, or storage fees, or the costs of repair of a thing which had been obtained without a legal ground’. This second aspect is essentially the reliance version I have been referring to, though there are some nuanced differences, and the first may essentially correspond to the ‘disaster version’. The ‘uneconomical use of a benefit’ which is a further way an enrichment can be lost (as provided for by T. Krebs (2001) 281), is essentially a ‘disaster version’ of the defence on my analysis.

<sup>967</sup> L.D. Smith (2001) 79 *Texas LR* 2115, 2148-49.

to do. Dishonesty in this instance represents the ‘bad faith’ aspect proscribing the defence. Bad faith here, in turn, is to be viewed as encompassing both a ‘self-conscious’ dishonesty as well as ‘unself-conscious’ dishonesty.<sup>968</sup> That is so, because where the defendant, for example, knows that the payment was made by mistake, the position is to be assumed to be quite straightforward: he must therefore return the benefit so acquired. It must be noted, however, that there are situations in which, despite that knowledge, the recipient’s conscience may be absolutely clear and his behaviour absolutely reasonable. In such cases, though the recipient knows that he is not entitled to such a benefit, he may have been led to believe that he must apply what he received in a particular way.<sup>969</sup> In these circumstances his belief in being entitled and bound to pay away the money is what counts, not his knowledge that he was not himself entitled to the benefit.<sup>970</sup>

Notwithstanding the above, difficulties might still arise where the defendant does not know for sure, but he has ground for believing that the payment has been made by mistake. In such cases, there is a possibility of finding that good faith may indicate that an extra inquiry be made to ascertain the veracity of the issue.

Be it as it may, the problem of how to measure the enrichment itself will remain in certain circumstances, because enrichment claims do not arise in a uniform manner. Some claims arise from ‘unilateral’ voluntary performances, others from involuntary performances, and there are those that arise from failed reciprocal agreement situations, as discussed in chapter three above, or in any other forms. Given the diversity and complexity of situations in which enrichment claims arise, it is a perennial problem the question whether to require in all and any enrichment claims the return of the ‘value received’ or that of the ‘value remaining’.<sup>971</sup> It is contentious because once a general principle against unjustified enrichment is sanctioned, the observable tendency in several legal systems is to move away from being concerned with the ‘value received’ to aiming at securing a disgorgement of the ‘value remaining’<sup>972</sup> or at least aspiring to getting rid-of the ‘net enrichment’ view and favouring an ‘itemised concept of enrichment’ liability, whose inevitable outcome is also the sanctioning of the defence of change of position/

<sup>968</sup> [2002] 2 All ER 705 EWHC (*Comm.*), [par. 135].

<sup>969</sup> Such was indeed what happened in *African Diamond Exporters v Barclays Bank* 1978 (3) SA 699 (A).

<sup>970</sup> P. B. H. Birks, ‘Change of position: Nature of the Defence...’ in M. McInnes (Ed) *Restitution & Development in Unjust Enrichment* (1996) 52.

<sup>971</sup> See chapter 1 above for the evolution of this thinking.

<sup>972</sup> S. Swann, ‘The Structure Of Liability For Unjustified Enrichment: First Proposals of The Study Group On An European Civil Code’ in R. Zimmermann (ed) *Grundstrukturen eines Europäischen Bereicherungsrechts* (2005) 279; D. P. Visser ‘Unjustified Enrichment in Comparative Perspective’ in M. Reimann & R. Zimmermann (ed) *The Oxford Handbook of Comparative Law* (2006) Chapter 30, p. 991.

loss of enrichment. But the application of 'value remaining' as the measure of enrichment often leads to incongruity in particular cases where the enrichment arose from failed reciprocal agreements.<sup>973</sup> In such situations it is strongly thought that the 'value received' should be the appropriate measure<sup>974</sup> because it would be inequitable if one of the contracting parties were allowed to rely on change of position due to an inability to return what he had received.<sup>975</sup> This facet of the law is sometimes dealt with under the rubric of *restitutio in integrum*.<sup>976</sup> Hence, though the application of the general principle against unjustified enrichment leads generally to sanctioning the 'value remaining' as the logical measure of enrichment in most instances, a caveat for its inapplicability in the cases of claims arising from failed synallagmatic agreements must be recognised as an inevitable exception. In other words, change-of-position as a defence cannot generally be made available in such circumstances. The proscription of loss of enrichment in synallagmatic contracts is further justified on the understanding that though an enrichment remedy within contracts does not necessarily redistribute the risks allocated by the contract, in the overwhelming majority of cases an enrichment remedy applied within a 'functioning' contract has greater possibilities of redistributing such risks. For this reason, a more sensible construction of the contract would be required.

The issue of 'value received' *versus* 'value remaining' surfaces also in the context of inflation and in the attempt to adjust monetary value according to specified indexes as art. 884 of the Brazilian Civil Code envisage. The main complications it raises in such context is to establish (i) the reason why between two innocent parties on such situations the loss is to be borne by the defendant and not by the claimant, and (ii) if 'adjustment' is made, and the legal system sanctions a claim of interest as a 'fruit' accruing to the principal sum, to ascertain on which 'principal amount' an interest accruing to an undue payment or an enrichment *sine causa* expressed in money is to be calculated. If it is on the nominal value received, then interest can indeed start to run when the claimant received the money or at least on the *litis contestatio* day; but if interest is to be assessed on the 'adjusted value', it is not possible to say that interest starts to run before that amount is actually established with certainty. Therefore, there seem to be incongruity between

<sup>973</sup> The contention of 'value received' *versus* 'value remaining' surfaces also in the context of inflation and in the attempt to adjust monetary value according to specified indexes as art. 884 of the Brazilian Civil Code envisage. Full discussion of this issue appears at Part III in chapter IV of the thesis.

<sup>974</sup> See P. Hellwege (1999) 7 *RLR* 93. D. P. Visser (*supra*) 992.

<sup>975</sup> *Ibid.*

<sup>976</sup> For a detailed discussion of the *restitutio in integrum* see the recent Article by P. Hellwege (2004) *Juridical Review* 165.

the amount claimable as a principal sum for the unjustified enrichment claim itself, and the fruit accruing to such principal, that also appears might be claimable.

Another common contentious issue, although it is so only to a degree, is to know whether in the application of the change of position defence in the 'reliance version' a distinction should be required between anticipatory reliance expenditure and subsequent reliance expenditure. There is often no unanimous answer to the question, as various approaches are advanced to defend one position or the other. In several common law jurisdictions, in particular, there is a conflicting message that in some cases which seem to expressly or impliedly assert that anticipatory reliance is a *sine qua non* for the availability and success of a change-of-position defence,<sup>977</sup> while in others the requisite is either by-passed or offset by other policy considerations. Thus cases such as *South Tyneside MBC v Svenska International Plc*<sup>978</sup> and *Hinckley and Bosworth BC v Shaw*<sup>979</sup> assume diametrically the opposite views embraced in cases such as *RBC Dominion Securities v Dawson*<sup>980</sup> and *Dextra Bank Trust Co v Bank of Jamaica*.<sup>981</sup> The position advanced in *Svenska* case that 'the defendant raising the change-of-position defence could not point to anticipatory expenditure incurred in reliance on the supposed validity of a void interest swap transaction' led the court to a controversial distinction that where the defendant 'has incurred detriment in reliance upon the payments he had received rather than upon his belief that the agreement under which they were made was valid',<sup>982</sup> or as Birks put it, a 'strict distinction between relying on the receipt and relying on the validity of the underlying transaction'.<sup>983</sup> But this distinction has come under fire, at least in English law, for the majority of commentators are of the view that the defence might become unduly narrow, if 'all instances of reliance on the validity of the underlying transaction had to be excluded', as it is difficult to construct any rational case for excluding reasonably anticipatory reliance from the defence.<sup>984</sup> This new position is the one that

<sup>977</sup> It is to be remembered that § 142 of the American Restatement of Restitution (1937) as well as section (§ 65) expressly limit the defence to changes of circumstances which supervene 'after the receipt of the benefit'. The current version is still being drafted as section 69-71 (Restatement (Third) of Restitution & Unjust Enrichment, Tentative Draft 1 (2001) and cross-referenced to illustrations 33-35 as well as §§ 65 and 67. Thus far it seems to still keep the spirit of § 142 or is somewhat 'ambiguous' or at best silent.

<sup>978</sup> [1995] 1 All ER 545.

<sup>979</sup> [2000] LRG 9, 51.

<sup>980</sup> (1994) 111 DLR (4<sup>th</sup>) 230.

<sup>981</sup> (2002) 1 All ER (comm.) 192.

<sup>982</sup> See full discussion of this distinction in Charles Mitchell (2005) *LMCLQ* 168, 180.

<sup>983</sup> P. B. H. Birks 'Change of position and Surviving Enrichment' in Swadling (Ed), *The Limits of Restitutionary Claims* (1997) Ch. 2.

<sup>984</sup> P. B. H. Birks 'Change of position and Surviving Enrichment' in W. Swadling (ed) *The Limits of Restitutionary Claims* (1997) Ch. 2; J. Beatson & E. Schrage (ed) *Unjustified Enrichment* (2003) 108 (§ 3.E.3).

is becoming entrenched in English law since the pronouncement in *Dextra Bank Trust Co v Bank of Jamaica*.<sup>985</sup> For our purposes, though it might currently be considered a moot point in South African law, it does not seem plausible to make such fine distinctions, and therefore the approach under BGB § 818(3) in such cases is preferable. It does not really matter whether the reliance upon which the defendant acted preceded or was subsequent to the transaction, if all other elements of the defence are satisfied, the defendant should succeed.

Finally, it must be acknowledged that, despite considerable advances in the understanding of the notion of unjust or unjustified enrichment, the concept can still be understood in at least three different ways as expelled out in details in chapters one, two and four, namely: (i) as a principle of ‘Aristotelian’ equity, providing correction when normally sound rules produce unjust or unjustifiable results in particular cases; (ii) as a ‘legal principle’ incorporating a broad notion of justice, from which courts can deduce solutions for particular problems requiring restoration of advantages or benefits acquired or derived at the expense of another;<sup>986</sup> and (iii) or as simply a generic concept expressing a common theme of restitution cases, i.e.; as a descriptive and organizational principle, which plays no role in judicial decision-making.<sup>987</sup> In the face of these diverse positions, the first major task in the determination and consideration of a loss of enrichment/change-of-position defence is really to establish under what guiding philosophy the defence operates. In other words, there is a correlation between the strength of the principle underpinning the claim and the vigour of the defence to the claim. Where the guiding philosophy of the enrichment doctrine is the notion of ‘Aristotelian equity’ and the enrichment doctrine assumes more the characteristics of corrective justice, the scope of the change-of-position defence is more likely to encompass both the ‘reliance version’ as well as the ‘disaster version’, but its ‘reliance version’ may not be as robust as where the guiding norm is a full-fledged general ‘legal principle’ incorporating a broad notion of justice.

From the aforesaid it can be concluded that the successful application of change of position as a general defence to enrichment claims, is directly proportional to the willingness of the legal

<sup>985</sup> (2002) 1 All ER (comm.) 192.

<sup>986</sup> This notion corresponds mostly with the current Brazilian, South African and also English and Canadian positions, though England and Canada could straddle both the first and the second view, and in some cases the third one as well. In the broader classification current South African law could equally fit to a certain extent the first category, if one considers that it still lacks a general principle. But the developments achieved so far, puts it more in the second group than the first one.

<sup>987</sup> This third view is mostly defended by Australian writers and also to some extent by few American and English theorists such as C. Saiman (2008) 28 *Oxford JLS* 99-126; Stephen Hedley, *Restitution: Its Ordering and Division* (2001), etc (see generally chapter 1 & 2 above).



system fully to accept that unjustified enrichment is a general principle *sui generis* which is not an offshoot of other branches of law, though it has relations to them, but it is an independent area of law founded upon the notion that no person should be allowed to benefit at the expense of another without justification.<sup>988</sup> As a matter of principle, the doctrine of change of position, once sanctioned, will apply as a defence to all claims in unjustified enrichment,<sup>989</sup> save those arising from synallagmatic failed agreements, as just stated above. In practice, however, given the need for the recipient to establish the good faith requirement or as it is variously described that ‘the lack of ‘knowledge’ of the facts entitling the other to restitution at the time of his purported change-of-position’, the major impact of the doctrine will always be in connection with the receipt of money on mistake<sup>990</sup> and probably few other instances outside that realm.

Can monetary inflation qualify as a form of change of position/circumstances? If so, how would it operate? What difficulties are there proving or disqualifying this potential head of the defence?

These questions may arise incidentally where a legal system is faced with a hyper-inflation and to cope with the problem in claims expressed in money it decides to generalise a regime of monetary correction based on specific indexes. That was the avenue, for example, chosen by Brazil as seen throughout the thesis. The new Brazilian *Código Civil* of 2002 appended ‘monetary adjustment’ to the general principle against unjustified enrichment.<sup>991</sup> Though my view expressed in the thesis is that such appendage to the general principle was unfortunate, as it throws the general principle into confusion, that does not mean that the issue should not feature within the enrichment doctrine, rather that the Brazilian drafters should have done so in a separate provision in order to ensure that the issue is not left to the discretion of the judges. What does really inflation tell us in such contexts? It tells us that the process of inflation can give rise to a multitude of problems, amongst which the most salient for our purposes are the issue of revalorization and discharge.

While revalorization (in our context) presupposes a debt that must be paid or re-paid in certain monetary units and thereby the possibility of adjustment; discharge, on the other hand, tells us that the contentious issue is a *contract* or arises from a contract and the fulfilment of the obligation is subject to underlying cost variations. If inflation is seen from the perspective of possibly discharging the contract, the concept presupposes a voluntary agreement between the

<sup>988</sup> D. 50.17.206 (Pomponius).

<sup>989</sup> G. H. Fridman & J. C. McLeod, *Restitution*, *Restitution* (1982) 606.

<sup>990</sup> *Ibid.*

<sup>991</sup> Brazilian new Civil Code art. 884.

parties, and inflation might be seen as one of the risks voluntarily assumed; when it is seen from the notion of revalorization, the concept does not necessarily presuppose a contract between the parties; it may also entail a unilateral act. In cases of devaluation neither the impossibility to restore the benefit received nor bad faith are part of the matter, because the receiver is ready to restore the benefit received, with the only problem that the 'purchasing power' of the money has diminished. Restoring nominally the same units as received corresponds 'numerically' with restoring the 'value received', but value-wise, it actually corresponds to the 'value remaining'. Given that both parties might be innocent there is no reason to shift the loss from one innocent party to another innocent party who neither made a mistake nor brought about the event that led to the decline of the value. As from the perspective of the parties such an incident (currency devaluation) is more similar to a supervening event outside their control and where both parties are in the position of two innocents the position of the defendant is to be considered the better. The corollary of this assertion is that should legislation be lacking in order to address the issue, there would still be room for judicial pronouncement and the change-of-position defence would be available in the circumstances. In short, the rationale presented for change-of-position in the 'disaster version' of the defence, would *mutatis mutandi* apply in these cases. The loss shall lie where it currently stands.

But there are borderline cases. Arguing that the defence of change of position should be considered in cases of inflation, it would also bring the query whether the same should be considered in cases of deflation,<sup>992</sup> with the difference being that the 'beneficiary' of the claim (in cases of deflation) would be the plaintiff. Thus, this situation arguably could bring symmetry to the law. Why is that the case?

That would be the case because on the general reading of the justification at the heart of change of position where it assumes the 'aspect' of a disenrichment defence, is that 'a claimant may be denied a remedy; even though the defendant may have recovered a benefit by consuming the gain transferred to him.'<sup>993</sup> The law in these circumstances has chosen to favour the defendant's security of receipt over the plaintiff's right to restitution, because it is found to be a sound philosophy and good policy that an innocent and honest defendant should never be left worse off

<sup>992</sup> While inflation is the phenomenon which occurs when money becomes relatively less valuable than goods, deflation is simply the opposite of that phenomenon, in that over time money becomes relatively more valuable than the other goods in the economy. Deflation generally occurs when the following four elements combine: (i) the supply of money goes down, (ii) the supply of other goods goes up, (iii) the demand for money goes up, (iv) the demand for other goods goes down.

<sup>993</sup> M. Rush, *The Defence of Passing on* (2006) 170.

as a result of being unjust or unjustifiably enriched. If the enrichment came about as the result of an innocent mistake there is no reason for shifting the loss from an innocent but mistaken party to an innocent defendant who committed no mistake.<sup>994</sup> Therefore, in such circumstances the risk of being left out of pocket is placed on the claimant and not on the defendant.<sup>995</sup> But the main problem in cases of inflation is that there is no mistake from either party. It is a 'fortuitous' event to both of them. Who then should shoulder such a risk?

Based on the assumption that where typically the change-of-position defence assumes the form of disenrichment (loss of enrichment) the risk is placed on the claimant and not on the defendant, some commentators theorise that it would also be a fair policy (an appropriate reasoning) if the claimant would also accrue the benefit of an increased enrichment.<sup>996</sup> Thus, Michael Rush, for example, argues that where the defendant increases or decreases the value of his unjust gain, provided he is compensated for his skills and labour (where such are applicable), the claimant should be awarded restitution for the remaining sum. In this way, an innocent defendant is never left worse off as a result of being unjustly enriched, and the plaintiff would recover this value of any profits made via the use of the wealth. Consequently, if the claimant bears the risk of losing his money to an honest and innocent recipient, he should also gain from an increase in value of the benefit transferred.<sup>997</sup>

This argument is however unrealistic and flawed. The issue does not square within the enrichment doctrine, in that if deflation appreciates the value of the currency, it cannot be said that that accrued/or regained value to the defendant was at the expense of the claimant nor such benefit accrued to the defendant without legal ground. The appreciation is a mere *casus fortuitous* not ascribable to the parties, and cannot give rise to any obligation, nor affect the measure of enrichment. If the money has now more purchasing power, tough luck to the defendant. He cannot reduce the amount due with such argument based on changed circumstances.

Difficult problems also arise in the application of enrichment principles in the public law sphere, particularly where taxes have been collected by the public authority, which are subsequently declared as 'inappropriately charged'. The main issue explored in this regard is the defence of passing on, the merits and demerits of such defence, and the contention that it is another face of

<sup>994</sup> H. Matter (1982) 92 *Yale LJ* 14, 42.

<sup>995</sup> M. Rush, *The Defence of Passing on* (2006) 170.

<sup>996</sup> *Ibid.* 170.

<sup>997</sup> *Ibid.* 171.

change of position. The underlying principles are that if the general principle against unjustified enrichment requires the plaintiff to have suffered a corresponding loss, which throughout the thesis I have termed as the 'mirror-image gain-loss', then, where the plaintiff has passed on the alleged loss to others, he should not be entitled to recover it from the defendant, because he (the plaintiff) is either the wrong party to the claim or else if allowed to recover, he would be infringing the same principle he is invoking be applied against the defendant.

Proving passing on however might be a challenging task. Thus, to the argument that passing on should not be accepted in South African legal system (the 'no-defence approach' as advocated by Visser and others<sup>998</sup>), not because it is in principle infeasible rather than on account of the complexities and/or near impossibility of establishing the proof, this thesis contends that such complexities may be partially overstated and some subtleties in the nature of the cases may have been overlooked. It is therefore submitted that the 'no defence' approach should be qualified and due consideration given to the availability of the defence if the imposts at issue were not meant to be passed-on, but were nevertheless passed-on and in circumstance where the claimant used 'mark-up pricing' in the operation of his business. The claimant bears the onus of proof and must supply the required evidence when alleging that he suffered loss as a result of the imposition of the tax at issue.

Another contentious issue raised was to know whether change of position as a defence should be available to the government/public authorities. There are pros and cons in allowing public authorities to make use of the defence, but ultimately the problem goes down once again to the two features of change of position – the 'reliance version' and the 'disaster version'. It was shown in chapter five above that it is incredibly difficult for the government to prove the reliance version of the defence. For example, where it collected the money from taxpayers, it would be nearly impossible to prove with substantial detachment that a specific sum of money collected or expected from one taxpayer is the one that was destined to and used in a particular activity or project. The government will seldom, if ever, make the case that 'but for' the receipt, it would not have undertaken certain activities or projects, because it is an ordinary task of public authorities to undertake public projects. Therefore, given such near impossibility of establishing the 'but for' requirement, the defence of change of position should not be available to a public body on the 'reliance version'.

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<sup>998</sup> See chapter five above for details and others writers contending the same.

The case is however different on the ‘disaster version’, which, in my view, is viable both in principle and on policy grounds. If the benefit received was lost due to a disaster, such as a ‘drastic and unexpected and unpredictable economic disaster’, or where the benefit received was money and there has been a sudden and uncontrollable inflation of the currency, which has wiped out both private and state’s wealth, and such a situation does not depend on the local authorities, in principle, the defence could be available to the state.

The main discussion also highlighted that it is a contentious issue classifying the winding up the consequences of ‘frustrated contracts’ utilizing the unjustified enrichment doctrine, as such approach is prone to inevitably bringing with it the availability of the defence of change of position to a ‘contracting party’, and thereby subverting bargains. But it was also pointed out that not all cases do fall within the ‘subverting bargains’ rationale, and therefore the unjustified enrichment doctrine is still the appropriate avenue for winding up such cases. And if the doctrine applies, the ‘value remaining’ as the measure of enrichment, comes once again into play. Faced with this impasse one is bound to find an exit door to the dilemma. The probable avenues are: either (i) declare that the model of winding up the consequences of a failed contract within the unjustified enrichment doctrine is not valid at all, for few would contest the correctness of the assertion that there can be no claim in unjustified enrichment unless the claimant shows that he was not otherwise obliged to confer the benefit in question, or (ii) if the model is valid and in appropriate circumstances the ‘value remaining’ cannot represent the measure of liability in unjustified enrichment, then a dual measure of liability must be sanctioned, or (iii) alternatively a concession must be made that the defence of change of position is not applicable to these cases, thereby acknowledging an important exception in the application of the defence.

We have seen that where enrichment liability arises from ineffective bilateral agreements whose end came through breach, none of the discussed jurisdictions made use of the changed circumstances defence. If the end came through discharge due to impossibility of performance or frustration of purpose, it was highlighted that the current South African position is that the plaintiff as creditor always bears the risk if the thing goes under, unless the defendant was at fault.<sup>999</sup> It was also emphasised that although such position is satisfactory in many instances, it leaves loopholes in the structure of the law, and it occasionally results in unjust outcomes. Consequently, in order to avoid such unjust outcomes, the proposition advocated here is to the

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<sup>999</sup> D. P. Visser, *Unjustified Enrichment* (2008) chapters 9 and 12.

effect that where the performance became impossible, and no risk allocation was agreed between the parties, the risk of loss should be allocated to the party who has/had control at the time of the loss and could reasonably insure against the loss, as Visser<sup>1000</sup> has recently argued. However, before the courts allocate the risk to such a party, due consideration must be had to the nature of the risk, whether it was endogenous or exogenous, to clearly establish the superior risk bearer. In essence, it is concluded that in bilateral agreements the defence of change of position/loss of enrichment is not to be made available to the parties, thereby establishing an important exception to the general defence as contended throughout the thesis. The measure of enrichment in such cases is therefore the 'value received'.

Finally, the thesis reiterates that in enrichment claims, in addition to the recognized instances of loss of enrichment as a defence, a severe devaluation of a currency is a candidate for a defendant to advance a change of position defence because where two innocents are affected for an event for which neither is responsible, the position of the defendant is to be preferred. The cardinal principle should always be that an 'innocent person should not be made to restore more than the amount by which they have been enriched' and not the other way around.

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<sup>1000</sup> Ibid.

*APPENDIXES / ANEXOS*

## APPENDIX 1.

### Brazilian Civil Code/ Código Civil do Brazil .

#### TÍTULO VII (TITLE VII).

#### DOS ACTOS UNILATERAIS (ON UNILATERAL ACTS)

#### CAPÍTULO II ( CHAPTER II )

#### Da Gestão de Negócios [*Negotiorum Gestio*]

**Art. 861.** Aquele que, sem autorização do interessado, intervém na gestão de negócio alheio, dirigi-lo-á segundo o interesse e a vontade presumível de seu dono, ficando responsável a este e às pessoas com que tratar.

*Art. 861. He who intervenes in the administration of another's affairs without authorization from 'the domino', must administer such affairs in accordance with the presumed will and interest of the domino, and shall be accountable to him and to the people with whom he deals.*

**Art. 862.** Se a gestão foi iniciada contra a vontade manifesta ou presumível do interessado, responderá o gestor até pelos casos fortuitos, não provando que teriam sobrevivido, ainda quando se houvesse abatido.

*Art. 862. The gestor shall answer even for fortuitous events if the administration was initiated against the manifest or presumed will of the domino, unless he proves that such events would have occurred anyway, even if he did not act.*

**Art. 863.** No caso do artigo antecedente, se os prejuízos da gestão excederem o seu proveito, poderá o dono do negócio exigir que o gestor restitua as coisas ao estado anterior, ou o indenize da diferença.

*Art. 863.—In the case of the preceding article, if the losses of the administration exceed its benefits, the owner of the business may demand that the gestor restore the things to the previous status or that he be compensated for the difference.*

**Art. 864.** Tanto que se possa, comunicará o gestor ao dono do negócio a gestão que assumiu, aguardando-lhe a resposta, se da espera não resultar perigo.

*Art. 864.—To the extent that it is possible the gestor shall communicate to the owner the administration that he has assumed, waiting for an answer if non peril results from waiting.*



**Art. 865.** Enquanto o dono não providenciar, velará o gestor pelo negócio, até o levar a cabo, esperando, se aquele falecer durante a gestão, as instruções dos herdeiros, sem se descuidar, entretanto, das medidas que o caso reclame.

*Art. 865.—While the owner's unavailability lasts, the gestor shall take care of the business up to the end. Should the owner die, he must wait instructions from the heirs without neglecting any measures that the case demands.*

**Art. 866.** O gestor envidará toda sua diligência habitual na administração do negócio, ressarcindo ao dono o prejuízo resultante de qualquer culpa na gestão.

*Art. 866.—The gestor shall apply his usual diligence in the administration of the business, compensating the owner for losses resulting from his fault in the administration.*

**Art. 867.** Se o gestor se fizer substituir por outrem, responderá pelas faltas do substituto, ainda que seja pessoa idônea, sem prejuízo da ação que a ele, ou ao dono do negócio, contra ela possa caber. Parágrafo único. Havendo mais de um gestor, solidária será a sua responsabilidade.

*Art. 867. If the gestor replaces himself for another, he shall be accountable for the shortcomings of his substitute even if he is a competent person, without prejudice of an action imputable to him or to the owner of the business*

*Parágrafo único: If there is more than one gestor, the responsibility shall be 'in solidum'.*

**Art. 868.** O gestor responde pelo caso fortuito quando fizer operações arriscadas, ainda que o dono costumasse fazê-las, ou quando preterir interesse deste em proveito de interesses seus. Parágrafo único. Querendo o dono aproveitar-se da gestão, será obrigado a indenizar o gestor das despesas necessárias, que tiver feito, e dos prejuízos, que por motivo da gestão, houver sofrido.

*Art. 868.—the gestor shall answer for fortuitous events when he engages in risky operations even if the owner used to do them, or when the gestor forgoes the owner's interests to further his own interests.*

*Parágrafo único: If the owner wants to take advantage of the administration, he is obliged to indemnify the gestor of the necessary expenditures that he made and of the losses he incurred because of such administration.*

**Art. 869.** Se o negócio for utilmente administrado, cumprirá ao dono as obrigações contraídas em seu nome, reembolsando ao gestor as despesas necessárias ou úteis que houver feito, com os juros legais, desde o desembolso, respondendo ainda pelos prejuízos que este houver sofrido por causa da gestão.

§ 1º A utilidade, ou necessidade, da despesa, apreciar-se-á não pelo resultado obtido, mas segundo as circunstâncias da ocasião em que se fizerem.

§ 2º Vigora o disposto neste artigo, ainda quando o gestor, em erro quanto ao dono do negócio, der a outra pessoa as contas da gestão.

*Art. 869.—If the business was finally administered, the obligations incurred in the name of the owner are imputed to him (the owner), and he must refund to the gestor any necessary and useful expenditures that he has made with legal interest. The owner must also pay damages that the gestor suffered for administering his business..*

*§ (1).—The usefulness or the necessity of the expenses shall be valued not by the result obtained, but according to the circumstances of the occasion in which they were incurred.*

*§ (2). The provisions of this article apply even when the gestor, in error as to the owner of the business, gave the accounts of the administration to another person.*

**Art. 870.** Aplica-se a disposição do artigo antecedente, quando a gestão se proponha a acudir a prejuízos iminentes, ou redunde em proveito do dono do negócio ou da coisa; mas a indenização ao gestor não excederá, em importância, as vantagens obtidas com a gestão.

*Art. 870.—The provision of the preceding article apply when the gestor made himself available (acted) to avoid imminent losses, or the action benefited the owner of the business or of the thing (the domino). However, the compensation to the gestor shall not exceed in value the benefits obtained with the administration.*

**Art. 871.** Quando alguém, na ausência do indivíduo obrigado a alimentos, por ele os prestar a quem se devem, poder-lhes-á reaver do devedor a importância, ainda que este não ratifique o ato.

*Art. 871.—If someone feeds a person that must be fed in the absence of the one bound to provide food to such person, he [the Samaritan] can recover his costs from the debtor even if the debtor does not ratify the act.*

**Art. 872.** Nas despesas do enterro, proporcionadas aos usos locais e à condição do falecido, feitas por terceiro, podem ser cobradas da pessoa que teria a obrigação de alimentar a que veio a falecer, ainda mesmo que esta não tenha deixado bens.

Parágrafo único. Cessa o disposto neste artigo e no antecedente, em se provando que o gestor fez essas despesas com o simples intento de bem-fazer.

*Art. 872. Funeral expenditures made by third parties (which are proportional to local uses and to the condition of the deceased) may be billed (charged) to the person that would have had the duty to feed the person that has died (the deceased), even if the deceased left to assets.*

*Parágrafo único. What is said in this article and the previous one cease if it is proved that the gestor made such expenditures with mere charity intention (with the mere intention to do a good thing).*

**Art. 873.** A ratificação pura e simples do dono do negócio retroage ao dia do começo da gestão, e produz todos os efeitos do mandato.

*Art. 873. The mere and simple ratification of the owner of the affairs (the domino) is retroactive to the day the administration (gestio) started, and it has all the effects of a mandate.*

**Art. 874.** Se o dono do negócio, ou da coisa, desaprovar a gestão, considerando-a contrária aos seus interesses, vigorará o disposto nos arts. 862 e 863, salvo o estabelecido nos arts. 869 e 870.

*Art. 874. – If the owner of the business, or of the thing, disapproves of the administration, considering it as contrary to his interests, the provisions of arts. 862 and 863 shall apply, save what is provided for in arts. 869 and 870.*

**Art. 875.** Se os negócios alheios forem conexos ao do gestor, de tal arte que se não possam gerir separadamente, haver-se-á o gestor por sócio daquele cujos interesses agenciar de envolta com os seus. Parágrafo único. No caso deste artigo, aquele em cujo benefício interveio o gestor só é obrigado na razão das vantagens que lograr.

*Art. 875. – If the affairs of another are linked to that of the gestor (administrator) in such a way that it is not possible to administer them separately, the gestor (administrator) shall be deemed as a partner of the person whose interests he administered with his own affairs.*

*Parágrafo único: In the case of this article, the person in whose benefit the gestor has intervened is only bound for the ratio of the advantages accrued to him (the ratio of the extent to which he benefited).*

### CAPÍTULO III (CHAPTER III)

#### Do Pagamento Indevido (*On Undue Payment*).

**Art. 876.** Todo aquele que recebeu o que lhe não era devido fica obrigado a restituir; obrigação que incumbe àquele que recebe dívida condicional antes de cumprida a condição.

*Art. 876.—Whoever received what was not due to him is obliged to restore it; the obligation is also applicable to whoever receives a conditional debt before the fulfillment of the condition.*

**Art. 877.** Àquele que voluntariamente pagou o indevido incumbe a prova de tê-lo feito por erro.

*Art. 877.—He who has paid voluntarily what was not due bears the onus to prove that he did so by mistake.*

**Art. 878.** Aos frutos, acessões, benfeitorias e deteriorações sobrevindas à coisa dada em pagamento indevido, aplica-se o disposto neste Código sobre o possuidor de boa-fé ou de má-fé, conforme o caso.

*Art. 878. To the fruits, accessions, improvements and deteriorations 'accrued' to the thing given in undue payment apply the provisions of this Code dealing with a good-faith possessor or a bad faith possessor, as the case may be.*

**Art. 879.** Se aquele que indevidamente recebeu um imóvel o tiver alienado em boa-fé, por título oneroso, responde somente pela quantia recebida; mas, se agiu de má-fé, além do valor do imóvel, responde por perdas e danos.

Parágrafo único. Se o imóvel foi alienado por título gratuito, ou se, alienado por título oneroso, o terceiro adquirente agiu de má-fé, cabe ao que pagou por erro o direito de reivindicação.

*Art. 879. If the one that has unduly received an immovable transfers it in good faith and for value, the respondent is only accountable for the quantity received; but, if he acted in bad faith, he is accountable for losses and damages plus the value of the immovable.*

*Parágrafo único: 'If the immovable was transferred without value, or, if, transferred for value, the third party who acquired it acted in bad faith, whoever has paid by error has the right to a reivindicatory action'.*

**Art. 880.** Fica isento de restituir pagamento indevido aquele que, recebendo-o como parte de dívida verdadeira, inutilizou o título, deixou prescrever a pretensão ou abriu mão das garantias que asseguravam seu direito; mas aquele que pagou dispõe de ação regressiva contra o verdadeiro devedor e seu fiador.

*Art. 880. Is exempt from restitution of an undue payment whoever that, after receiving it as part of a true debt, has invalidated the title, has allowed the claim to prescribe or has relinquished the guaranties that had secured his right; but he who has paid has the right to a regressive action against the true debtor and his guarantor.*

**Art. 881.** Se o pagamento indevido tiver consistido no desempenho de obrigação de fazer ou para eximir-se da obrigação de não fazer, aquele que recebeu a prestação fica na obrigação de indenizar o que a cumpriu, na medida do lucro obtido.

*Art. 881. If the undue payment consists in the exercise of an obligation to do or to 'prevent' an obligation not to do, he who has received the performance is obliged to indemnify the one who fulfilled the obligation to the extent of the profits made.*

**Art. 882.** Não se pode repetir o que se pagou para solver dívida prescrita, ou cumprir obrigação judicialmente inexigível.

*Art. 882. - There is no restitution for what was paid to solve a debt that has prescribed, or to fulfill a judicial obligation non demandable [inexigível].*

**Art. 883.** Não terá direito à repetição aquele que deu alguma coisa para obter fim ilícito, imoral, ou proibido por lei.

Parágrafo único. No caso deste artigo, o que se deu reverterá em favor de estabelecimento local de beneficência, a critério do juiz.

*Art. 883. He who has given something to obtain an illicit, immoral or a aim prohibited by law has no right to restitution.*

*Parágrafo único: In the case of this article, what was given shall revert in favour of local charity as the judge directs.*

**CAPÍTULO IV (CHAPTER IV).**  
**Do Enriquecimento Sem Causa (*On Enrichment Sine Causa*).**

**Art. 884.** Aquele que, sem justa causa, se enriquecer à custa de outrem, será obrigado a restituir o indevidamente auferido, feita a atualização dos valores monetários.

Parágrafo único. Se o enriquecimento tiver por objeto coisa determinada, quem a recebeu é obrigado a restituí-la, e, se a coisa não mais subsistir, a restituição se fará pelo valor do bem na época em que foi exigido.

*Art. 884. He who, without just cause, is enriched at another's expense, is obliged to restore what was unduly obtained, after 'updating (or adjusting) the monetary values.*

*Parágrafo único: If the object of the enrichment claim consists in a specific thing, he who has received it is under a duty to restore it, and, if the thing does no longer subsist, its restitution shall be effected by its value at the time it was demanded.*

**Art. 885.** A restituição é devida, não só quando não tenha havido causa que justifique o enriquecimento, mas também se esta deixou de existir.

*Art. 885. Restitution is due not only when there has been no causa that justifies the enrichment, but also when such a causa ceased to exist.*

**Art. 886.** Não caberá a restituição por enriquecimento, se a lei conferir ao lesado outros meios para se ressarcir do prejuízo sofrido.

*Art. 886. No restitutionary action for enrichment shall be entertained if the law grants to the aggrieved party other means to redress the loss suffered.*

## APPENDIX 2.

### Brazilian Civil Code / Código Civil do Brazil

#### DAS OBRIGAÇÕES DE DAR

##### Seção I

#### Das Obrigações de Dar Coisa Certa (*On Obligations to Give Certa Res*).

(My own Translation).

**Art. 233.** A obrigação de dar coisa certa abrange os acessórios dela embora não mencionados, salvo se o contrário resultar do título ou das circunstâncias do caso.

*Art. 233. The obligation to give a certain thing [certa res] encompasses its accessories even if not mentioned, save if the contrary results from a title or the circumstances of the case provide otherwise.*

**Art. 234.** Se, no caso do artigo antecedente, a coisa se perder, sem culpa do devedor, antes da tradição, ou pendente a condição suspensiva, fica resolvida a obrigação para ambas as partes; se a perda resultar de culpa do devedor, responderá este pelo equivalente e mais perdas e danos.

*Art. 234. In the case of the preceding article if the thing is lost without the debtor's fault before the transfer or while a suspensive condition is pending, both parties are absolved from the obligation; if the loss is the result of the debtor's fault, he (the debtor) is liable for its equivalent plus losses and damages.*

**Art. 235.** Deteriorada a coisa, não sendo o devedor culpado, poderá o credor resolver a obrigação, ou aceitar a coisa, abatido de seu preço o valor que perdeu.

*Art. 235. If the thing deteriorates in circumstances where the debtor is not to blame, the creditor can terminate the obligation, or accept the thing after reducing from its price the value that it has lost.*

**Art. 236.** Sendo culpado o devedor, poderá o credor exigir o equivalente, ou aceitar a coisa no estado em que se acha, com direito a reclamar, em um ou em outro caso, indenização das perdas e danos.

*Art. 236. If the debtor is to blame, the creditor can demand its equivalent, or accept the thing as it is. In both cases he has the right to claim he be indemnified for losses and damages.*

**Art. 237.** Até a tradição pertence ao devedor a coisa, com os seus melhoramentos e acrescidos, pelos quais poderá exigir aumento no preço; se o credor não anuir, poderá o devedor resolver a obrigação.

Parágrafo único. Os frutos percebidos são do devedor, cabendo ao credor os pendentes.

*Art. 237. The thing with its improvements and additions belongs to the debtor until it is transferred. The debtor can demand increase in price for the thing for its improvements and additions; if the creditor does not agree, the debtor can terminate the obligation.*

*Parágrafo único: The fruits received belong to the debtor; those pending belong to the creditor.*

**Art. 238.** Se a obrigação for de restituir coisa certa, e esta, sem culpa do devedor, se perder antes da tradição, sofrerá o credor a perda, e a obrigação se resolverá, ressalvados os seus direitos até o dia da perda.

*Art. 238—If the obligation is to restore a certain thing, and this thing, without the debtor's fault, is lost before the transfer (traditio), the creditor shall 'suffer' the loss, and the obligation will be terminated, save his rights up to the date of the loss.*

**Art. 239.** Se a coisa se perder por culpa do devedor, responderá este pelo equivalente, mais perdas e danos.

*Art.239—If the thing is lost due to the fault of the debtor, the debtor shall answer for its equivalent, plus the losses and damages.*

**Art. 240.** Se a coisa restituível se deteriorar sem culpa do devedor, recebê-la-á o credor, tal qual se ache, sem direito a indenização; se por culpa do devedor, observar-se-á o disposto no art. 239.

*Art.240.—If the thing that must be restored deteriorates without the debtor's fault, the creditor must receive it, as it is, without any right to be indemnified; the provisions of article 239 shall be applicable if it deteriorates due to the debtor's fault.*

**Art. 241.** Se, no caso do art. 238, sobrevier melhoramento ou acréscimo à coisa, sem despesa ou trabalho do devedor, lucrará o credor, desobrigado de indenização.

*Art. 241— In the case of art. 238, should there be any improvement or addition to the thing, without any labour or expense of the debtor, the creditor shall take the benefit, without any obligation to indemnify.*

**Art. 242.** Se para o melhoramento, ou aumento, empregou o devedor trabalho ou dispêndio, o caso se regulará pelas normas deste Código atinentes às benfeitorias realizadas pelo possuidor de boa-fé ou de má-fé.

Parágrafo único. Quanto aos frutos percebidos, observar-se-á, do mesmo modo, o disposto neste Código, acerca do possuidor de boa-fé ou de má-fé.

*Art. 242—If in order to effect the improvement or the addition, the debtor has done some work, the case shall be regulated by the norms of this Code that deal with improvements done by a good-faith or bad-faith possessor.*

*Parágrafo único: As regard the fruits received, the provision of this Code on good-faith and bad-faith possessors shall apply.*



## Seção II

### Das Obrigações de Dar Coisa Incerta (*On Obligation to Give an uncertain thing*).

**Art. 243.** A coisa incerta será indicada, ao menos, pelo gênero e pela quantidade.

*Art. 243\_\_An uncertain thing shall be indicated at least by its genus or by its quantity.*

**Art. 244.** Nas coisas determinadas pelo gênero e pela quantidade, a escolha pertence ao devedor, se o contrário não resultar do título da obrigação; mas não poderá dar a coisa pior, nem será obrigado a prestar a melhor.

*Art. 244\_\_Where the things are determined by genus and by quantity, the choice is that of the debtor, if the contrary does not result from the title of the obligation; but he (the debtor) shall not give a worse thing, nor shall he be obliged to give the better thing.*

**Art. 245.** Cientificado da escolha o credor, vigorará o disposto na Seção antecedente.

*Art. 245\_\_The dispositions of the preceding Section apply as soon as the creditor becomes aware of the choice.*

**Art. 246.** Antes da escolha, não poderá o devedor alegar perda ou deterioração da coisa, ainda que por força maior ou caso fortuito.

*Art. 246\_\_Before the choice the debtor may not allege loss or deterioration of the thing, even for force majeure or a fortuitous event.*

## CAPÍTULO II

### Das Obrigações de Fazer (*On the Obligation to Do*).

**Art. 247.** Incorre na obrigação de indenizar perdas e danos o devedor que recusar a prestação a ele só imposta, ou só por ele exequível.

*Art. 247\_\_A debtor who refuses an obligation that is only imposed on him incurs the obligation to indemnify for losses and damages.*

**Art. 248.** Se a prestação do fato tornar-se impossível sem culpa do devedor, resolver-se-á a obrigação; se por culpa dele, responderá por perdas e danos.

*Art. 248\_\_If the performance of the matter becomes impossible without the debtor's fault, the obligation is extinguished; if the impossibility is due to the debtor fault, he shall respond for losses and damages.*

**Art. 249.** Se o fato puder ser executado por terceiro, será livre ao credor mandá-lo executar à custa do devedor, havendo recusa ou mora deste, sem prejuízo da indenização cabível.

Parágrafo único. Em caso de urgência, pode o credor, independentemente de autorização judicial, executar ou mandar executar o fato, sendo depois ressarcido.



*Art. 249\_\_If performance may be executed by a third party and the debtor refuses or falls in mora, the creditor shall be free to order it to be executed at the debtor's expense without prejudice to the indemnification deriving from the action.*

*Parágrafo único: In cases of emergency, the creditor may, independently of a judicial authorization, execute or have the matter executed and be compensated latter.*

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## APPENDIX 3.

### Selected Provisions of the

### **Código Tributário Nacional (Brasil). (Brazilian National Tax Code).**

#### SEÇÃO III – Pagamento Indevido (Section III – Undue Payment).

#### **Article. 165.**

O sujeito passivo tem direito, independentemente de prévio protesto, à restituição total ou parcial do tributo, seja qual for a modalidade do seu pagamento, ressalvado o disposto no § 4º do artigo 162, nos seguintes casos:

I - cobrança ou pagamento espontâneo de tributo indevido ou maior que o devido em face da legislação tributária aplicável, ou da natureza ou circunstâncias materiais do fato gerador efetivamente ocorrido;

II - erro na edificação do sujeito passivo, na determinação da alíquota aplicável, no cálculo do montante do débito ou na elaboração ou conferência de qualquer documento relativo ao pagamento;

III - reforma, anulação, revogação ou rescisão de decisão condenatória.

*Art. 165 – Save the disposition of paragraph 4 of Art. 162, the passive subject has the right to total or partial restitution of a tax in the following cases, regardless of any previous protestation and whatever might have been the modality of its payment:*

*(i) — the spontaneous charging or the payment of an undue tax or a levy which is higher (greater) than that which is due in the face of the applicable tax legislation, or of the nature or material circumstances of the fact that effectively gave rise to what happened;*

*(ii) — a mistake in the establishment '(edification)' of the passive subject, in the determination of the applicable 'flat tax' [alíquota], in the calculation of the amount of the debit, or in the conferral of any document regarding the payment;*

*(iii) — reform, annulations, revocation or rescission of a 'condemnatory' (penal) decision.*

**Art. 166.** A restituição de tributos que comportem, por sua natureza, transferência do respectivo encargo financeiro somente será feita a quem prove haver assumido o referido encargo, ou, no caso de tê-lo transferido a terceiro, estar por este expressamente autorizado a recebê-la.

*Art. 166 'Restitution of taxes that, by their nature, entail transfer of the said financial burden shall only be effected to someone that proves to have undertaken the said burden, or, in the case he has transferred it to a third party, the transferee must expressly have authorised him to receive it.*

## **Código do Consumidor (Brazil) . (Brazilian Consumer Code) .**

**Art. 42.** - da cobrança de dívidas. “Na cobrança de débitos, o consumidor inadimplente não será exposto a ridículo, nem será submetido a qualquer tipo de constrangimento ou ameaça.

**Parágrafo único** – ‘*O consumidor cobrado em quantia indevida tem direito à repetição do indébito, por valor igual ao dobro do que pagou em excesso, acrescido de correção monetária e juros legais, salvo hipótese de engano justificável*’ .

### **Art. 42 On Demand of Debts.**

*When demanding debts, a consumer who has not performed shall not be exposed to ridicule, nor shall he be subject to any kind of constraints or threat.*

### **Parágrafo único.**

*A Consumer that has been billed for an amount not due has the right to a claim for restitution (repetitio of the undue amount) assessed as twice as the amount that he has paid in excess, to which value it shall be added the monetary correction (monetary adjustment) and legal interest, except in the hypothesis of a justifiable error.*

## APPENDIX IV.

### Selected Provisions of the German BGB mentioned often in this thesis.

(English translation as it appears in (1999) *Restitution Law Review* (1994) 14ff).

#### **BGB § 812.** [Grundsatz].

(1)--Wer durch die Leistung eines anderen oder in sonstiger Weise auf dessen Kosten etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet. Diese Verpflichtung besteht auch dann, wenn der rechtliche Grund später wegfällt oder der mit einer Leistung nach dem Inhalte des Rechtsgeschäfts bezweckte Erfolg nicht eintritt.

(2)--Als Leistung gilt auch die durch Vertrag erfolgte Anerkennung des Bestehens oder des Nichtbestehens eines Schuldverhältnisses.

#### BGB § 812 [Principle].

*(1)-- A person who, through an act performed by another, or in any other manner, acquires something at the expense of the latter without any legal ground, is bound to return it to him. This obligation subsists even if the legal ground subsequently disappears or the result intended to be produced by an act to be performed pursuant to the legal transaction is not produced.*

*(2)-- Recognition of the existence or non-existence of a debt, if made under a contract, is also deemed to be an act of performance.*

#### **BGB § 816.** [Verfügung eines Nichtberechtigten].

(1) – Trifft ein Nichtberechtigter über einen Gegenstand eine Verfügung, die dem Berechtigten gegenüber wirksam ist, so ist er dem Berechtigten zur Herausgabe des durch die Verfügung Erlangten verpflichtet. Erfolgt die Verfügung unentgeltlich, so trifft die gleiche Verpflichtung denjenigen, welcher auf Grund der Verfügung unmittelbar einen rechtlichen Vorteil erlangt.

(2)— Wird an einen Nichtberechtigten eine Leistung bewirkt, die dem Berechtigten gegenüber wirksam ist, so ist der Nichtberechtigte dem Berechtigten zur Herausgabe des Geleisteten.

#### BGB § 816 [Disposition by a person without Title].

*(1) --If a person without title to an object makes a disposition of it which is binding upon the person having title, he is bound to hand over to the latter what he has obtained by the disposition. If the disposition is made gratuitously the same obligation is imposed upon the person who acquires a legal advantage directly through the disposition.*

*(2)—If an act of performance is done for the benefit of a person not entitled thereto, which is effective against the person entitled, the former is bound to hand over to the latter the value of such performance.*

**BGB § 818. [Umfang des Bereicherungsanspruchs].**

(1) – Die Verpflichtung zur Herausgabe erstreckt sich auf die gezogenen Nutzungen sowie auf dasjenige, was der Empfänger auf Grund eines erlangten Rechtes oder als Ersatz für die Zerstörung, Beschädigung oder Entziehung des erlangten Gegenstandes erwirbt.

(2) -- Ist die Herausgabe wegen der Beschafftheit des Erlangten nicht möglich oder ist der Empfänger aus einem anderen Grunde zur Herausgabe ausserstande, so hat er den Wert zu ersetzen.

(3) - Die Verpflichtung zur Herausgabe oder zum Ersatze des Wertes ist ausgeschlossen, soweit der Empfänger nicht mehr bereichert ist.

**BGB § 818 – [Extent of Enrichment Claim].**

*(1) - The obligation to return extends to emoluments derived, and to whatever the recipient acquires either by virtue of a right obtained by him, or as a compensation for the destruction, damage or deprivation of the object detained.*

*(2) - If the return of that which was received is no longer possible due to its condition, or if the recipient is on other ground not able to return it, he has to replace its value.*

*(3) --The obligation to return [that which was received] or replace its value falls away insofar as the recipient is no longer enriched.*

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